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Ethical and Aggressive Appellate Advocacy: The Decision to Petition for Certiorari in Criminal Cases

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ARTICLE

ETHICAL AND AGGRESSIVE APPELLATE ADVOCACY: THE DECISION TO PETITION FOR CERTIORARI IN CRIMINAL CASES

J. THOMAS SULLIVAN*

Over the past six decades, United States Supreme Court decisions have dramatically reshaped the criminal justice process to provide significant protections for defendants charged in federal and state proceedings, reflecting a remarkable expansion of due process and specific constitutional guarantees. For criminal defendants seeking relief based on recognition of new rules of constitutional criminal procedure, application of existing rules or precedent to novel factual scenarios, or in some cases, enforcement of existing precedent, obtaining relief requires further action on the Court's part. In those situations, the Court's exercise of its certiorari jurisdiction is the exclusive remedy offering an avenue for reversal of conviction or order vacating the sentence. Petitioning for review by writ of certiorari is essential to the defendant's chances for obtaining relief and is what might be characterized

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This is the third in a series of articles addressing appellate practice from a different perspective than that usually taken by appellate courts with respect to counsel's duty in representing the client. It differs from Chief Justice Warren Burger's approach to attorneys serving as an officer of the court, as he expressed while writing for the majority in *Jones v. Barnes*, 463 U.S. 745 (1983). For the author's prior articles addressing a more aggressive approach to appellate advocacy than that taken by the *Jones* majority, see J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Precedent*, 59 U. MIAMI L. REV. 341 (2005), and J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The "Ethical" Issue of Issue Selection*, 80 DENV. U.L. REV. 155 (2002).

as the “final tool” in the appellate lawyer’s “toolbox.” There are at least five scenarios in which the petition for writ of certiorari is critical, and counsel must be aware of circumstances dictating strategic decisions that need to be made in order to protect the client’s options for relief in the direct appeal and post-conviction processes.

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I. INTRODUCTION

For many criminal defendants, the filing of a petition for writ of certiorari to challenge an adverse decision on direct appeal or in the post-conviction process offers the final chance to avoid the consequences of the conviction or sentence imposed at trial. Unfortunately, counsel representing criminal defendants on the direct appeal or in post-conviction process often fail to appreciate the need to petition the Supreme Court for review of an adverse decision rendered by a lower court on claims of constitutional error and, consequently, do not pursue this potential avenue for relief. Yet, the Court has positioned itself as the ultimate arbiter of issues arising in interpretation and application of federal constitutional protections afforded the accused, and failure to pursue review of federal constitutional claims by writ of certiorari will result in default of claims that might otherwise have proved to be meritorious.¹

The enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)² made notable changes to federal habeas practice and reinforced the significance of certiorari practice. This “reform” of federal habeas practice, directed primarily at state court defendants pursuing

1. Margaret and Richard Cordray offer this particularly apt observation:

Over the past century, the Supreme Court has gained virtually complete control over its own agenda. Once a relatively passive institution which heard all appeals that Congress authorized, the Court is now a virtually autonomous decisionmaker with respect to the nature and extent of its own workload. . . . [T]he Court’s muscular authority over case selection in the modern era now gives it the unchallenged prerogative in almost every instance to choose whether to resolve or to bypass important controversies that are brought before it in particular cases.

Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 389 (2004).

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

federal constitutional claims, effectively defused federal habeas corpus as a realistic alternative to direct certiorari review by the Supreme Court when relief from the state trial court's conviction or sentence would require novel thinking or expansion of then-existing precedent.³

AEDPA dramatically limited the authority of federal habeas courts to provide relief to state inmates asserting violations of federal constitutional protections in state court proceedings. Habeas relief is no longer available unless the state court's disposition of the federal claim results in a ruling *contrary* to or reflects an *unreasonable* determination or application of existing Supreme Court precedent.⁴ The imposition of this standard effectively requires the federal habeas court to defer to state court decision making on issues of fact and interpretation of federal constitutional protections.⁵

Thus, the effect of AEDPA is to restrict the power of federal habeas courts to grant relief from state court convictions by requiring the petitioner to prove that the state court acted unreasonably by failing to apply federal constitutional protections. Further, the federal habeas courts and courts of appeal are strictly limited in evaluating the unreasonableness of state court determinations of Supreme Court precedent, barring the lower federal courts from expanding upon existing precedent through analogous reasoning or an extension of precedent to novel factual scenarios.⁶ Because federal habeas relief is so unlikely, federal habeas corpus does not afford an alternate route for relief for state court defendants who must argue for new rules or interpretations of federal constitutional protections in order to avoid adverse state court decisions. Certiorari is *not* the preferable alternative; it is the necessary process for arguing for relief on theories or factual scenarios requiring creative constitutional interpretation.⁷

3. See *id.* (limiting state court defendants applying for habeas relief to a few qualifying situations, such as a new constitutional right made retroactive).

4. 28 U.S.C. § 2254(d)(1)–(2) (2018). Section 2254(d)(1) expressly provides that relief may be granted only when the state court ruling on a federal constitutional claim has “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” *Id.* § 2254(d)(1).

5. In *Schriro v. Landrigan*, the majority succinctly explained: “The question under AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a *substantially higher threshold*.” *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (emphasis added).

6. See, e.g., *Goeke v. Branch*, 514 U.S. 115, 120–21 (1995) (per curiam) (holding federal habeas courts cannot announce new rules of constitutional criminal procedure).

7. In *Lackey v. Texas*, after the Court had initially stayed Lackey’s execution to permit consideration of his Eighth Amendment claim that his seventeen-year confinement awaiting execution

II. THE CRIMINAL DEFENSE LAWYER AND THE PETITION FOR WRIT OF CERTIORARI

Typically, defendants are bound by their counsel's judgment respecting the conduct of an appeal following conviction.⁸ They are also bound by

violated his constitutional protections, Justice John Paul Stevens issued a memorandum respecting the denial of certiorari. *Lackey v. Texas*, 514 U.S. 1045 (1995). Justice Stevens did not dissent but explained:

Often, a denial of certiorari on a novel issue will permit the state and federal courts to “serve as laboratories in which the issue receives further study before it is addressed by this Court.” Petitioner’s claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.

Id. at 1047 (citation omitted).

AEDPA, however, ended the “laboratory” approach that permitted different federal circuits to experiment with novel issues or claims before the Supreme Court granted certiorari to resolve conflicting approaches in the respective cases. While state courts might engage in such experimentation, a more promising approach for litigants has been to rely on state constitutional provisions that may hold greater procedural protection for criminal defendants than existing Supreme Court precedent. Justice William Brennan explained in his seminal article:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

The practical approach to using these alternative sources of law is examined in J. Thomas Sullivan, *Developing a State Constitutional Law Strategy for New Mexico Prosecutions*, 39 N.M. L. REV. 407, 410–11 (2009), and Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 664–76 (1987). *See also* *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (“It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.” (quoting *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940))).

8. The majority in *Jones v. Barnes* deferred to counsel’s professional experience in assessing the potential merits of claims that could be presented on appeal, concluding that “the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Instead, the majority explained: “Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.” *Id.* at 751–52. The Court rejected the argument that appellate counsel’s refusal to argue a colorable point of error on appeal constituted ineffective assistance, despite the defendant’s instruction that the issue be included. *Id.* at 753. However, the Court later recognized that counsel’s failure to raise a meritorious issue on appeal constitutes ineffective assistance if the accused demonstrates that there was a reasonable probability of a different outcome had counsel included the issue, resulting in reversal on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285

counsel's errors,⁹ except when counsel's error rises to the level of ineffective assistance,¹⁰ which is the case only when the Sixth Amendment right to effective assistance of counsel is applicable.¹¹

Defense counsel's decision not to file a petition for certiorari in the Supreme Court may result from a perception that review will be unlikely, a

(2000) ("[The defendant] must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal."); *see also, e.g.*, *Gantt v. State*, 209 A.3d 812, 820 (Md. Ct. Spec. App. 2018) (adopting *Jones* in holding no constitutional violation occurred when appellant's counsel failed to include a non-frivolous argument for strategic reasons).

9. For instance, in *Taylor v. Illinois*, defense counsel committed misconduct when he failed to disclose the identity of witnesses whom he intended to call at trial, in violation of the trial court's discovery order. *Taylor v. Illinois*, 484 U.S. 400 (1988). When the trial court excluded the witnesses, the accused complained that his lawyer's misconduct violated his right to compulsory process under the Sixth Amendment. *Id.* at 406. The *Taylor* majority recognized the problem posed when counsel's decisions are imputed to the client, but explained:

The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney–client relationship Putting to one side the exceptional cases in which counsel is ineffective, *the client must accept the consequences of the lawyer's decision* to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial. In this case, petitioner has no greater right to disavow his lawyer's decision to conceal [the witness's] identity until after the trial had commenced than he has to disavow the decision to refrain from adducing testimony from the eyewitnesses who were identified in the Answer to Discovery. Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may *wound* his own client.

Id. at 417–18 (emphasis added).

10. For instance, in a Virginia state post-conviction action, a petitioner sentenced to death sought to raise constitutional challenges that had not been preserved at trial or on direct appeal. *Coleman v. Thompson*, 895 F.2d 139, 145 (4th Cir. 1990). When the Supreme Court of Virginia reviewed the denial of relief in the post-conviction process based on procedural default, the court held that Thompson's counsel failed to timely file the required notice of appeal and dismissed the appeal. *Id.* at 142. Pursuant to 28 U.S.C. § 2254, when Thompson subsequently petitioned for federal habeas corpus to assert constitutional claims, he argued that counsel's failure to perfect the appeal from denial of post-conviction relief amounted to ineffective assistance and warranted relief. *Id.* at 144. The Supreme Court rejected the ineffective assistance claim, holding that the Sixth Amendment guarantee extends only to assistance rendered by trial and appellate counsel in the first step of the appellate process, and not to representation in discretionary appellate or post-conviction representation. *Coleman v. Thompson*, 501 U.S. 722, 756–57 (1991).

11. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (declining to interpret an Eighth Amendment right to assistance of counsel for post-conviction relief to indigent state court defendants sentenced to death); *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987) (reaffirming the Court has never held an indigent litigant has a Sixth Amendment right to assistance of counsel in a collateral attack on a conviction or sentence); *Ross v. Moffitt*, 417 U.S. 600, 618–19 (1974) (finding no Fourteenth Amendment violation if a state does not afford counsel to an indigent defendant for the purpose of petitioning for discretionary review once counsel has provided representation in the initial appeal).

reasonable assessment given the small number of petitions granted by the Court every year.¹² This assessment turns on three assumptions. First, some of the most pressing cases heard by the Court involve national interest issues, such as the continuing criminalization of consensual homosexual activity. As one might reasonably have expected, the Court granted certiorari review in *Lawrence v. Texas*,¹³ ultimately voiding state sodomy statutes. Apart from issues of significant social or political interest, it is far harder to predict which cases will be reviewed, with the notable exception of issues arising in the context of capital sentencing.¹⁴ Over the years, the Court has regularly reviewed cases in which a death sentence has been imposed, addressing issues of procedural regularity;¹⁵ Eighth Amendment limitations upon the exercise of state power in the use of capital

12. The Court itself provides the relevant data on its website: “The Court receives approximately 7,000–8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases.” *Frequently Asked Questions*, SUP. CT. U.S., https://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/N9PF-EMHQ>].

13. *Lawrence v. Texas*, 539 U.S. 558 (2003), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

14. The Court’s continuing concern with capital sentencing has been evident since it began regulating the sentencing process. *See* *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) (holding that the death penalty in the cases reviewed violated due process). It has recognized the constitutionality of most post-*Furman* statutes that rationalize capital sentencing as punishing the most—arguably—deserving capital offenders. *See* *Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976) (affirming constitutionality of capital sentencing scheme which specifies narrow “class of murderers” along with statutory jury instruction for aggravating factors and mitigating circumstances); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (“Texas’ capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments.”); *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (holding that, while unlike *Jurek* and *Gregg* due to bench review of capital sentence, Florida’s post-*Furman* legislation ensures “informed, focused, guided, and objective inquiry” following sentencing).

15. *See* *Missouri v. McNeely*, 569 U.S. 141, 165 (2013) (concluding the Fourth Amendment requires warrant for the seizure of blood from a suspect); *Georgia v. Randolph*, 547 U.S. 103, 122–23 (2006) (rejecting State’s argument that consent of one co-tenant of jointly occupied residence is sufficient for consent to search); *Bradshaw v. Stumpf*, 545 U.S. 175, 187–88 (2005) (remanding for reconsideration of death sentence where prosecutor used inconsistent theories in pursuing death penalty against co-defendants); *Deck v. Missouri*, 544 U.S. 622, 632–34 (2005) (determining a defendant shackled during capital sentencing need not demonstrate actual prejudice to survive a due process challenge); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (holding prosecutor’s exercise of peremptory challenges in capital prosecution demonstrated racial discriminatory intent, despite contrary findings of state and lower federal courts); *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005) (concluding trial counsel rendered ineffective assistance in failing to examine file on defendant’s prior conviction admitted at capital sentencing hearing).

punishment;¹⁶ and physical circumstances of execution.¹⁷

Second, the lack of adequate compensation available for retained or appointed counsel continuing representation may also frustrate lawyers who may have provided aggressive representation to a client. Even when working on certiorari proceedings for fair compensation,¹⁸ counsel appointed in federal cases, including federal habeas corpus actions brought by state court defendants, may often find themselves drained by their efforts to exhaust available remedies.¹⁹ Exhaustion of remedies is the key

16. See *Kennedy v. Louisiana*, 554 U.S. 407, 445–47 (2008) (explaining that, even with aggravating circumstances, “the death penalty is not a proportional punishment for the rape of a child”); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)) (restricting state power to execute a mentally retarded capital defendant); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (emphasizing that a capital defendant must be afforded the opportunity to offer evidence and have a jury consider mitigating factors of a mental defect or retardation); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (barring execution of juvenile offender aged 15 or under at time of offense); *Tison v. Arizona*, 481 U.S. 137, 156–58 (1987) (addressing culpability standard for imposing death sentence on accomplices who do not effectuate a victim’s death in the commission of capital murder); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (“For purposes of imposing the death penalty, [the defendant’s] criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.”); *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980) (holding capital sentence unconstitutional if the only evidence of aggravating circumstances existing during commission of the murder were “outrageously or wantonly vile”); *Coker v. Georgia*, 433 U.S. 584, 597–600 (1977) (stating Eighth Amendment prohibits execution for offense of rape of adult woman); *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (holding mandatory death penalty unconstitutional due to a “lack of focus on the circumstances of the particular offense and the character and propensities of the offender”); *Woodson v. North Carolina*, 428 U.S. 280, 292–94 (1976) (reasoning the “evolving standards of decency respecting the imposition of punishment in our society” demands the prohibition of mandatory death penalty statutes).

17. See *Baze v. Rees*, 553 U.S. 35, 62–63 (2008) (rejecting challenge to Kentucky’s execution protocol); *Nelson v. Campbell*, 541 U.S. 637, 642–43 (2004) (permitting death row inmate habeas corpus relief in action brought under 28 U.S.C. § 1983 to challenge the means by which Alabama’s statutory execution method would be administered through venous access).

18. In *Austin v. United States*, the Court considered whether counsel appointed under 18 U.S.C. § 3006(A) to represent a federal defendant wanting to petition for a writ of certiorari had a duty to file the petition, despite counsel’s assessment that the petition would be frivolous. *Austin v. United States*, 513 U.S. 5, 7 (1994) (per curiam). Under the Fourth Circuit’s plan for implementing the statute, counsel was under an obligation to “prepare and file a timely petition.” *Id.* at 6–7. The Court granted counsel’s motion for leave to withdraw, despite the mandatory wording of the rule, while encouraging the circuit courts to craft rules to permit counsel to assess the merits of a certiorari petition and withdraw in the event the claims asserted are deemed meritless. See *id.* at 7 (“[I]his Court’s Rule 42.2 allows an award of damages or costs against [counsel] if he were to file a frivolous petition.”).

19. The requirement that federal constitutional claims be exhausted in state proceedings is critical to the exercise of jurisdiction by the Supreme Court and federal habeas courts. Rule 10 of the

procedural step in preserving the criminal defendant's options of petitioning the Court for review on federal constitutional claims or raising those claims in the federal habeas corpus process. With respect to either of these alternatives, neither the Court²⁰ nor a federal habeas court²¹ will address a state court defendant's claims on the merits unless they have been presented to the state courts for resolution first.

Third, some lawyers make an assessment that the probability of success on an issue has been foreclosed due to existing precedent and are thus not

Rules of the Court provides that certiorari may be granted under what are generally precisely-defined circumstances:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, *although neither controlling nor fully measuring the Court's discretion*, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SUP. CT. R. 10 (emphasis added). The Court's rule, interestingly, does not expressly limit its exercise of certiorari jurisdiction, as the highlighted language indicates.

20. 28 U.S.C. § 1257 (2018).

21. Section 2254(b)(1) provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State[.]" In *O'Sullivan v. Boerckel* the Court explained further:

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition.

O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

inclined to challenge adverse authority from the Court.²² While there might be legitimate concern for advancing a frivolous argument in a certiorari petition, counsel is entitled to make an argument for challenging existing precedent if done in good faith. Rule 3.1 of the Model Rules for Professional Conduct provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, *which includes a good faith argument for an extension, modification or reversal of existing law.* A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.²³

Still, many lawyers do not petition for review by certiorari or—assuming they considered the option at all—even decide not to do so. The decision not to pursue review in the Supreme Court may actually be a reasoned one based on the lack of prospects for success. Regardless, courts typically afford deference to the decision not to petition for certiorari. In *Jones v. Barnes*,²⁴ former Chief Justice Warren Burger concluded the right to effective assistance of counsel under the Sixth Amendment²⁵ does not require appellate counsel to raise every non-frivolous, colorable issue despite the client's express request that counsel do so.²⁶ This conclusion prompted a vigorous response from Justice Brennan, who argued:

22. *But see* J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Precedent*, 59 U. MIAMI L. REV. 341, 355 (2005) (recommending counsel consult dissenting opinions to bolster arguments to overrule existing precedent).

23. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2019) (emphasis added).

24. *Jones v. Barnes*, 463 U.S. 745 (1983).

25. The accused's Sixth Amendment right to "Assistance of counsel for his defense" has been construed to be the right to effective assistance of counsel. U.S. CONST., amend. VI; *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

26. *Jones*, 463 U.S. at 751–54. Almost every legal authority opining on brief writing offers the same advice; appellate counsel best serves the client by arguing only the most promising issues on appeal and discarding those that appear to have less merit or suggest a complete lack of merit. *See Smith v. Murray*, 477 U.S. 527, 536 (1986) (noting the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence," reflects competent appellate advocacy (quoting *Jones*, 463 U.S. at 751–52)); John W. Davis, *The Argument of An Appeal*, 26 A.B.A. J. 895, 895 (1940), *reprinted in* 3 J. APP. PRAC. & PROCESS 745, 747 (2001) ("I shall assume that these briefs are models of brevity . . ."); John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 8 SW. L.J. 801, 809

The Court, subtly but unmistakably, adopts a different conception of the defense lawyer's role—he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.

I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime.²⁷

In terms of the conduct of the appeal, the discretion afforded to counsel may result in a failure to pursue certiorari otherwise necessary in order to reverse a conviction or sentence potentially tainted by federal constitutional error.²⁸

The Court has recognized that appellate counsel, like trial counsel, may render ineffective assistance in the first instance of the appeal. This may involve a failure to comply with a procedural requirement for perfecting the appeal, as in *Evitts v. Lucey*,²⁹ or a failure to pursue a meritorious claim, as in

(1976) (“[C]ounsel must select with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment.”); Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951) (“The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.”). For a different view of appellate counsel's role and argument for including issues urged by the client and those requiring a court to overrule, change, or modify existing law, see generally J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The “Ethical” Issue of Issue Selection*, 80 DENV. U. L. REV. 155 (2002).

27. *Jones*, 463 U.S. at 763–64 (Brennan, J., dissenting).

28. For instance, in *Caldwell v. Mississippi*, appellate counsel argued that, because the prosecutor's closing argument advised jurors they need not worry about making an error in imposing death because the case would be reviewed on appeal, an issue not included on appeal nonetheless required reversal. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). Trial counsel had, in fact, objected to the closing argument. The Supreme Court granted certiorari and ordered the death sentence vacated because the argument was designed to basically relieve jurors of concern that the death penalty be imposed appropriately in their deliberations. *Id.* at 341. The Court heard the case only because the state supreme court addressed the issue *sua sponte* on the direct appeal. *Caldwell v. State*, 443 So. 2d 806, 813–14 (Miss. 1983) (Broom, P.J., sentencing phase).

29. See *Evitts v. Lucey*, 469 U.S. 387, 389, 396–97 (1985) (concluding appellate counsel's failure to file statutory statement of appeal violated his indigent client's right to effective assistance of counsel).

Smith v. Robbins.³⁰ The test in *Smith* is that generally applied to ineffective assistance claims under the Court's ruling in *Strickland v. Washington*,³¹ which requires the appellant to show that counsel's performance was defective and there was "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different."³² An interesting problem in the application of the *Strickland* test involves the threshold showing a petitioner must make in order to obtain relief.

In the context of trial counsel's representation, the petitioner does not have to demonstrate that effective performance would have necessarily brought about a different result, only that there was a reasonable *probability* of a different result. The question then is, What degree of prejudice must be shown when the defective performance concerns counsel's failure to raise a meritorious argument on appeal?

For example, in *Wooten v. State*,³³ the Arkansas Supreme Court, while citing *Strickland* as the controlling standard for claims of ineffective assistance, explained that in order to prevail in the post-conviction process, the petitioner must show:

[T]hat there could have been a specific issue raised on appeal that would have resulted in the appellate court's declaring reversible error. It is petitioner's responsibility in a Rule 37.1 petition to establish that the issue was raised at trial, that the trial court erred in its ruling on the issue, and that an argument concerning the issue could have been raised on appeal to merit appellate relief. The failure to make a meritless argument on appeal does not constitute ineffective assistance of counsel.³⁴

Determining the likelihood that, with reasonable probability, a different outcome would have resulted had counsel performed effectively typically requires a retrospective assessment of the error and its probable prejudice in light of the totality of the record of the proceedings. On appeal, however, the claim appellate counsel's ineffectiveness can be assessed by the

30. See *Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the *Strickland* test [H]owever, the prejudice analysis will be the same.").

31. *Strickland v. Washington*, 466 U.S. 668 (1984).

32. *Smith*, 528 U.S. at 286 (quoting *Strickland*, 466 U.S. at 694).

33. *Wooten v. State*, 502 S.W.3d 503 (Ark. 2016).

34. *Id.* at 508.

reviewing court in terms of existing precedent.³⁵ In the absence of controlling precedent, the strength of the argument that could have been asserted typically turns on an argument for adopting a new rule of either substance or procedure; extending existing precedent as a means to afford relief on the defaulted claim; or considering the issue of prejudice or harmless of the error in light of the totality of the evidence.

But the petitioner's conclusion that counsel's failure to raise a claim demonstrates ineffective assistance and thus requires reversal is simply not consistent with the precise standard recognized in *Smith*. There, the Court explained that in the context of a no-merits brief filed by appellate counsel, the petitioner "must show a reasonable probability that, but for his counsel's *unreasonable* failure to file a merits brief, he would have prevailed on his appeal."³⁶

In *Neill v. Gibson*,³⁷ the Tenth Circuit applied the less absolutist formula as articulated by the Arkansas courts and explained that its previous standard requiring petitioner to demonstrate appellate counsel failed to argue a "dead-bang" error requiring reversal was inconsistent with the Court's position in *Strickland*.³⁸ In a footnote, the en banc court explained:

This court has expressed this test in terms of appellate counsel's omitting a "dead-bang winner," often defined in part as a claim that "would have resulted

35. *Acord Burnside v. State*, 537 S.W.3d 796, 802 (Ark. Ct. App. 2017) ("The petitioner must show that there could have been a specific issue raised on appeal that would have resulted in the appellate court's declaring reversible error." (citing *Wooten*, 502 S.W.3d at 508 (Ark 2016))).

36. *Smith*, 528 U.S. at 285 (emphasis added). In *Smith*, the Court referenced the Sixth Circuit's decision in *Gray v. Greer*, which explained its view of the proper application of *Strickland* in assessing appellate counsel's performance:

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

37. *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001).

38. In *United States v. Cook*, the Tenth Circuit defined "dead-bang winner" as "an issue which was obvious from the trial record" that it "must have leaped out upon even a casual reading of the transcript." *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (quoting *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987)).

in a reversal on appeal.” To the extent this language can be read as requiring the defendant to establish that the omitted claim would have resulted in his obtaining relief on appeal, rather than there being only a reasonable probability the omitted claim would have resulted in relief, this language conflicts with *Strickland*. The en banc court, therefore, *expressly disavows the use of the “dead-bang winner” language* to imply requiring a showing more onerous than a reasonable probability that the omitted claim would have resulted in a reversal on appeal.³⁹

Finally, although appellate counsel’s performance may give rise to a claim of ineffectiveness, the Sixth Amendment guarantee of effective assistance extends only through the first-step appeal in the state’s appellate process. Because the Court limited the right of post-trial review to the initial step in the direct appeal,⁴⁰ ineffectiveness on the part of appellate counsel in representation beyond the first step in the appeal does not violate the Sixth Amendment.⁴¹

III. THE COURT’S CERTIORARI JURISDICTION

For defendants whose claims are rejected in the direct appeal or post-conviction process after federal criminal trials,⁴² or for state court

39. *Neill*, 278 F.3d at 1057 n.5 (emphasis added) (citations omitted).

40. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987); *Ross v. Moffitt*, 417 U.S. 600, 619 (1974). In *Griffin v. Illinois*, the Court held that, as a matter of Equal Protection, an indigent criminal defendant had a right to the appellate record, or a reasonable substitute, as it was essential to arguing claims of error on appeal in a manner comparable to the position afforded to appellants with financial resources. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). Later, in *Douglas v. California*, the Court expanded this reasoning to require states to provide indigent appellants with representation by counsel through the first level of the appellate process. *Douglas v. California*, 372 U.S. 353, 357–58 (1963). However, in *Ross*, *Finley*, and *Giarratano*, the Court drew the line on the Equal Protection guarantee by holding that states are not required to afford indigent defendants assistance of counsel beyond the first appeal, including discretionary petitions, post-conviction proceedings, or challenges to death sentences, respectively.

41. Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 350 n.20 (2003). In *Coleman v. Thompson*, post-conviction counsel failed to timely file a perfected appeal from denial of relief. The petitioner’s ineffective assistance claim was rejected because there is no right to counsel in such proceedings and therefore, no right to effective assistance of counsel. *Coleman v. Thompson*, 501 U.S. 722, 751–52 (1991). But, in the capital case *Maples v. Thomas*, the Court held that procedural default barring review of a claim in federal habeas corpus would be excused where pro bono counsel abandoned their client in state post-conviction proceedings, resulting in the default. *Maples v. Thomas*, 565 U.S. 266, 271 (2012).

42. 28 U.S.C. § 2255 (2018). Section 2255(a) provides:

defendants pursuing federal habeas process, petitioning for certiorari in the Supreme Court will offer a narrow possibility for review and, ultimately, relief from a conviction or sentence imposed at trial. In the direct appeal process afforded federal defendants, certiorari offers the possibility for review of circuit court decisions rejecting constitutional claims,⁴³ or non-constitutional claims arising from interpretation of federal statutes,⁴⁴ procedure,⁴⁵ or evidentiary rules.⁴⁶

The statutory basis for the Court's exercise of certiorari jurisdiction for a decision rendered by a United States Circuit Court of Appeals provides a procedural device for claims rejected in federal criminal proceedings or

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, *or is otherwise subject to collateral attack*, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Id. § 2255(a) (emphasis added). The language of Section 2255 does not limit consideration of post-conviction claims asserted by defendants convicted in federal trials to claims arising under the Constitution.

43. *E.g.*, *Burks v. United States*, 437 U.S. 1, 18 (1978) (holding that reversal of conviction on appeal based on insufficient evidence supporting conviction bars retrial as a matter of double jeopardy protection afforded by the Fifth Amendment).

44. *See* *Elonis v. United States*, 135 S. Ct. 2001, 2011–12 (2015) (requiring prosecution to prove accused intended for wire communication to constitute a threat or that accused knew that recipient would interpret communication as an actual threat to commit an act of violence); *Burrage v. United States*, 571 U.S. 204, 218–19 (2014) (holding prosecution must strictly prove death of drug user caused by specific illegal substance provided by accused, rather than the combination of drugs, in order to warrant enhanced sentence of life imprisonment for drug trafficker).

45. *E.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (directing federal circuit courts to apply Rule 52(b), permitting review for plain error when considering unpreserved claims of trial court error in sentencing proceedings and rejecting standard requiring proof of “manifest injustice” for review of unpreserved claims).

46. *See* *Dowling v. United States*, 493 U.S. 342, 350 (1990) (permitting prosecution to use extrinsic evidence of robbery even though defendant had been acquitted because evidence did not unequivocally demonstrate acquittal based on defendant's innocence and the two offenses were sufficiently similar for Rule 404(b) purposes); *United States v. Abel*, 469 U.S. 45, 50–51 (1984) (recognizing broad right to impeach witness despite lack of specific reference to “impeachment” in Federal Rules of Evidence). In *Abel*, the defendant's witness was a member of prison gang. The gang's tenets included killing and lying to protect other gang members and evidence relating to the prison gang was admissible to impeach testimony by showing the defense witness's lack of credibility. *Abel*, 469 U.S. at 56.

decisions of circuit courts rendered in federal habeas corpus proceedings brought by state court inmates. Section 1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.⁴⁷

The Supreme Court's jurisdiction is also defined by Section 1257 which provides the statutory basis for review of federal constitutional claims raised and rejected by defendants in state criminal proceedings concluded on direct appeal or in state post-conviction proceedings. It provides:

(a) *Final judgments or decrees rendered by the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.⁴⁸

Review by the "highest court of a state" means the state court defendant must have exhausted the available process by which the claim can be presented before review by the highest court,⁴⁹ whether review is afforded

47. 28 U.S.C. § 1254.

48. *Id.* § 1257 (emphasis added).

49. *E.g.*, *Hinkston v. State*, 10 S.W.3d 906 (Ark. 2000). Trial counsel in *Hinkston* offered the expert testimony of a psychologist who opined that the defendant lacked the ability to form the required level of intent for capital murder. The trial court excluded the argument and had the discretion to determine whether the expert testimony would assist the jury or, holding that as a matter of state evidence law, would possibly confuse jurors. On appeal, counsel argued the exclusion of the expert

in the direct appeal or state post-conviction process.⁵⁰ If the state provides for appellate review on the federal constitutional issue in an intermediate court of appeals, the defendant must typically seek review of the issue by the state supreme court or its equivalent.⁵¹

However, the “highest court” reference in Section 1257(a) is modified by the phrase “in which a decision could be had.”⁵² Thus, the petition for certiorari may be filed to review a decision rendered by a lower court in rare instances. In *Brown v. Texas*,⁵³ for instance, the Court reversed a conviction on a charge that the accused failed to properly identify himself to a police officer.⁵⁴ After being convicted in municipal court, he sought a trial de novo in the El Paso County Court where he was convicted and fined \$45, plus court costs. Because Texas law did not authorize an appeal beyond the county court level unless the defendant was fined at least \$100, the Supreme Court had jurisdiction to review the case because the county court was the “highest court” under Texas procedure “in which a decision could be had.”⁵⁵ In contrast to the jurisdictional limitation exception imposed by Texas in *Brown*, the Court has consistently held that a petitioner who did not seek review in the highest court of a state “in which a decision

testimony, expressly admissible under ARK. CODE ANN. § 5-2-303, violated the Sixth Amendment right to present a defense as a matter of compulsory process. The Arkansas Supreme Court declined to consider appellate counsel’s argument on the Sixth Amendment claim on the merits, explaining “[w]e do not consider arguments, even constitutional ones, raised for the first time on appeal.” *Id.* at 909.

50. 28 U.S.C. § 1257(a).

51. See *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quashing certiorari when record revealed federal constitutional claim had not been presented to state courts); *Riggins v. Nevada*, 504 U.S. 127, 133 (1992) (refusing to consider claim that forced medication of capital defendant asserting insanity defense, rendering him competent for trial, violated his right to have jury observe him in same mental state as that existing at time of crime because the argument had not previously been presented to the state supreme court); *Heath v. Alabama*, 474 U.S. 82, 87 (1985) (rejecting claim that Alabama courts lacked jurisdiction because defendant had already been prosecuted for capital murder in Georgia and failed to present claim in Alabama direct appeal).

52. The “court of last resort,” is the highest court in a judicial system. *Court: Court of Last Resort*, BLACK’S LAW DICTIONARY (11th ed. 2019). In state court systems, that court is not always designated, or known as, the state supreme court. For instance, in Texas, the Texas Court of Criminal Appeals is the court of last resort having jurisdiction over criminal matters. The Texas Supreme Court is the court of last resort in civil matters.

53. *Brown v. Texas*, 443 U.S. 47 (1979).

54. *Id.* at 49–50.

55. *Id.* at 50 (quoting 28 U.S.C. § 1257(2)).

could be had” cannot seek review of the adverse ruling by a lower state court through certiorari review.⁵⁶

IV. PRESERVATION OF FEDERAL CONSTITUTIONAL CLAIMS

Perhaps in a perfect world—at least for appellate lawyers—trial lawyers would always consult appellate counsel about the need to preserve error so that issues would always be properly preserved for an appeal on the merits. But the world is not perfect. What is clear from the Court’s decisions is that it will not review constitutional claims that have not been preserved in federal or state court proceedings.

The Court has consistently rejected review by certiorari of otherwise arguably meritorious claims not litigated in the highest court in a state court system, even though that lower court has otherwise rendered a decision in the case.⁵⁷ The Court’s jurisdiction is based on review of the claim actually presented in the certiorari petition, not by the fact that the case has been heard on other claims in the highest court of the state which *could* have reviewed the claim. In contrast, in *Caldwell v. Mississippi*,⁵⁸ the Court reversed the state supreme court’s ruling on an issue preserved by objection at trial but not urged on direct appeal. It found that a prosecutor’s argument that jurors should not be unduly worried about erring in imposing a death sentence because the case would be reviewed on appeal invited jurors to treat the sentencing decision with less gravity.⁵⁹

However, when a litigant has presented a federal constitutional claim in the state direct appeal, including a petition for review in the state supreme court, and the reviewing court declines to consider the federal claim on the merits, that refusal will be deemed a rejection unless the court rules that the

56. In *Banks v. California*, the Court explained:

Petitioner did not ask the Supreme Court of California to review the judgment entered by the Court of Appeal in this case. Therefore, the decision of the Court of Appeal is not a “[f]inal judgment . . . rendered by the highest court of a State in which a decision could be had . . .” and we lack jurisdiction to review it. The writ of certiorari is dismissed for want of jurisdiction.

Banks v. California, 395 U.S. 708, 708 (1969) (per curiam) (citing 28 U.S.C. § 1257); *accord* *Sandquist v. California*, 419 U.S. 1066, 1066 (1974) (dismissing petition for writ of certiorari for “lack of jurisdiction”).

57. *Howell*, 543 U.S. 440; *Riggins*, 504 U.S. 127; *Heath*, 474 U.S. 82; *Sandquist*, 419 U.S. 1066; *Banks*, 395 U.S. 708.

58. *Caldwell v. Mississippi*, 432 U.S. 320 (1985).

59. *Id.* at 327.

claim procedurally defaulted.⁶⁰ For instance, in *Ylst v. Nunnemaker*,⁶¹ the Court explained:

State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.⁶²

The consequence is state appellate courts cannot preclude federal review of properly preserved constitutional claims by inadvertently failing to acknowledge them or deliberately declining to review them. Only by applying reasonable procedural bars to a review on the merits can state courts escape further review on those claims.⁶³

Similarly, review of a state court defendant's federal constitutional claims brought under the federal habeas corpus process requires exhaustion of state remedies before the federal habeas court will review a claim on the merits.⁶⁴ Prior to the Court's decision in *O'Sullivan v. Boerckel*,⁶⁵ there was a circuit split as to whether the exhaustion requirement included filing a petition for discretionary review for purposes of federal habeas jurisdiction.⁶⁶ The Supreme Court's holding in *Boerckel* resolved the conflict

60. In *Harris v. Reed*, the Court held that where the state court in post-conviction proceedings rejected the federal constitutional claim on the merits, that holding provided a basis for federal review on the merits where the state court had not held that the claim was waived and, consequently, procedurally defaulted. *Harris v. Reed*, 489 U.S. 255, 258, 266 (1989).

61. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991).

62. *Id.* at 801 (citing *Harris*, 489 U.S. at 262); *accord* *Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." (citing *Harris*, 489 U.S. at 265)).

63. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 740–42 (1991).

64. 28 U.S.C. § 2254(b)–(c) (2018).

65. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

66. *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1199 n.2 (7th Cir. 1998). *Compare* *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (noting discretionary review in Minnesota Supreme Court is not necessary for exhaustion of claim); *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (determining the Georgia Supreme Court's limited jurisdiction in discretionary appeals does not obligate state inmates to present a claim in a discretionary petition in order to assert a claim in federal habeas petitions), *with* *Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991) (holding exhaustion of New York claims requires petition for discretionary review of claims subsequently asserted in federal habeas petition); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (*per curiam*) (reasoning petitioner's "right to raise before the Arizona Supreme Court the issue he seeks to raise in federal habeas" creates a

while leaving undisturbed the circuit court's characterizations of state appellate process for purposes of determining prerequisites for exhaustion of federal claims ultimately asserted in federal habeas petitions.⁶⁷

Boerckel argued that the language in Illinois Supreme Court Rule 315(a)⁶⁸ expressly discouraged the filing of petitions for discretionary review when raising routine issues.⁶⁹ Based on this language, he argued that he should not be required to exhaust state court process when the state supreme court itself discouraged that process.⁷⁰ The Supreme Court, however, read the language of Section 2254(c) as strictly requiring exhaustion of any process made available under state law, regardless of whether the exhaustion might be futile in terms of seeking to overturn state court precedent on a federal constitutional claim.⁷¹ When confronted by this concern of increased state court filings, the Court seemingly dismissed the issue as insignificant:

We acknowledge that the rule we announce today—requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State—has the *potential* to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts

prerequisite for exhaustion); *Richardson v. Procnier*, 762 F.2d 429, 431 (5th Cir. 1985) (“[T]he exhaustion doctrine requires that the Texas Court of Criminal Appeals be given an opportunity to review and rule upon the petitioner’s claim before he resorts to federal courts.”).

67. *O’Sullivan*, 526 U.S. at 847–48.

68. ILL. S. CT. R. 315 (eff. Oct. 1, 2019). Subsection (a) of the rule provides in pertinent part:

[A] petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court’s supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

69. *O’Sullivan*, 526 U.S. at 845–46.

70. *Id.* at 846–47.

71. *Id.* at 847–48.

do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court.⁷²

The Court's willingness to force state litigants to exhaust seemingly futile state court remedies, and the concomitant burden imposed on state courts of last resort, stems from its overriding concern with comity. It explained: "By requiring state prisoners to give the Illinois Supreme Court the opportunity to resolve constitutional errors in the first instance, the rule we announce today serves the comity interests that drive the exhaustion doctrine."⁷³

V. THE IMPORTANCE OF THE CERTIORARI PETITION FOR REVIEW OF CONSTITUTIONAL CLAIMS IN CRIMINAL CASES

The Supreme Court has historically been the most important institutional actor in the development of criminal procedure and—at least with respect to minimal constitutional requirements for notice—the regulation of substantive criminal law. Typically, federal constitutional protections are considered in the context of procedural matters. Thus, procedural protections governing the investigation and prosecution of criminal cases are predicated on rights set forth in the Fourth, Fifth and Sixth Amendments. With the exception of the Fifth Amendment right to indictment by grand jury in federal prosecutions,⁷⁴ these rights extend to criminal defendants in state courts through the Fourteenth Amendment.

72. *Id.* at 847.

73. *Id.* at 846. There is, of course, some inconsistency in ordering state courts to consider marginally colorable claims presented in petitions for discretionary review in order to respect the notion of *comity*, in light of the Court's explanation:

Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose v. Lundy, 455 U.S. 509, 519 (1982) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

74. *Hurtado v. California*, 110 U.S. 516, 534 (1884).

A. *Substantive Protections Afforded by the Constitution*

Notwithstanding the foregoing, other protections afforded by the Constitution do not involve matters of procedure, but rather serve as substantive limitations on the general authority afforded the states to define and punish criminal conduct. The Court expressly recognized this delegation of power in *Patterson v. New York*.⁷⁵ In *Patterson*, the Court reviewed its holding in *Mullaney v. Wilbur*,⁷⁶ and rejected its previous position concerning the constitutionally required construction of murder under Maine's homicide law.⁷⁷ The *Mullaney* Court held the prosecution could not rely on a defendant's failure to raise an issue of justification to establish the essential element of malice to prove the defendant deliberately committed murder.⁷⁸

However, in *Hankerson v. North Carolina*,⁷⁹ the *Mullaney* Court's holding was held retroactive based on the conclusion that the error compromised the integrity of the fact-finding process.⁸⁰ This line of cases demonstrates the substance–procedure distinction in operation: substantive limitations involve the authority of the state to criminalize, while procedural limitations implicate the means by which the criminal action is investigated and prosecuted. While states are granted latitude in the criminalization decision, as *Patterson* confirms,⁸¹ the implementation of their substantive law may nevertheless be subject to review because the process accorded fails to satisfy Fourteenth Amendment due process protections.

In *Miller v. Alabama*,⁸² the Court held that sentencing authorities must consider the age of an accused juvenile convicted of homicide as a mitigating circumstance factored into mandatory life-sentencing determinations. The Court applied its holding retroactively to juvenile offenders serving mandatory life sentences without the possibility of parole.⁸³ Subsequently,

75. *Patterson v. New York*, 432 U.S. 197 (1977).

76. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

77. *Patterson*, 432 U.S. at 205–06.

78. *Mullaney*, 421 U.S. at 701 (finding the burden of proof had been shifted from the prosecution to the defendant to prove that he did not act with malice in the commission of murder).

79. *Hankerson v. North Carolina*, 432 U.S. 233 (1977).

80. *Id.* at 240.

81. *Patterson*, 432 U.S. at 201–02.

82. *Miller v. Alabama*, 567 U.S. 460 (2012).

83. *Id.* at 489.

in *Montgomery v. Louisiana*,⁸⁴ the Court decided that decisions announcing new rules of substantive law must indeed be applied retroactively by states in post-conviction actions,⁸⁵ explaining:

The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts.⁸⁶

At least five general examples of substantive, rather than procedural guarantees, can be identifiably traced to federal constitutional protections: (1) the protection against successive prosecution afforded by the Double Jeopardy Clause of the Fifth Amendment⁸⁷; (2) the prohibition against imposition of cruel and unusual punishment found in the Eighth Amendment⁸⁸; (3) the proscription of criminalization of

84. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The *Montgomery* Court, like *Miller*, considered whether or not its decision limiting sentencing authority for juvenile homicide offenders applied retroactively in state post-conviction proceedings. *Id.* at 732.

85. *Id.* at 729 ("This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.").

86. *Id.*

87. In fact, the protection afforded by the Double Jeopardy Clause differs markedly from purely procedural protections. In *Abney v. United States*, the Court held that the Fifth Amendment protects the accused not only against successive verdicts, but against successive prosecutions, such that an accused asserting a colorable claim of prior jeopardy is entitled to proceed by interlocutory appeal. *Abney v. United States*, 431 U.S. 651 (1977); see *Richardson v. United States*, 468 U.S. 317, 321 (1984) (determining defendant raised colorable claim of prior jeopardy in challenging legal sufficiency of evidence in trial terminated by mistrial due to jury's inability to reach unanimous verdict, but jury's failure to reach verdict resulted in no final judgment from which appeal could be taken considering sufficiency of evidence).

88. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (stating execution of an insane inmate violates the Eighth Amendment). In *Ford*, the Court essentially held that this claim invoked the first exception to the *Teague v. Lane* retroactivity bar. *Teague v. Lane*, 489 U.S. 288, 311 (1989). It did not find that the claim lies outside the scope of *Teague*'s scheme of regulation because execution of an insane individual did not relate to a rule of criminal procedure, but rather, involved a substantive constitutional limitation on the criminalization authority. For other examples of substantive rights not strictly governed by retroactivity policies, see, for example, *Graham v. Florida*, 560 U.S. 48, 82 (2010),

fundamental rights—such as religion, assembly, and speech—protected by the First Amendment,⁸⁹ or freedom to engage in consensual sexual activity between adults⁹⁰; (4) the prohibition against ex post facto application of law found, not in the Bill of Rights, but in Article I, Section 10⁹¹; and (5) the due process-based conclusion that a criminal conviction must be predicated on proof of all elements of the offense charged beyond a reasonable doubt.⁹² These protections are essentially substantive, not procedural, and do not implicate the type of rules that are given limited retroactive application by the Court in *Teague v. Lane*.⁹³

B. *The Griffith Retroactivity Rule*

One of the critical questions addressed in the incorporation process involved the determination of exactly when a rule or application of a federal constitutional criminal procedural protection recognized by the Court would apply to state court litigation. The Court essentially provided definition in two decisions, *Griffith v. Kentucky*,⁹⁴ and later in *Teague*.⁹⁵ In

which barred the imposition of a life sentence without the possibility of parole for juvenile offenders convicted of non-homicide offenses.

89. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (striking down Ohio statute prohibiting speech advocating overthrow of government that is “not directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

90. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

91. *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (indicating a law that punishes an innocent and previously committed act makes a punishment more burdensome for a crime or “deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.”).

92. *See Bousley v. United States*, 523 U.S. 614, 624 (1998) (determining a post-conviction challenge to statute requiring strict proof of “use” of firearm in commission of drug offense, rather than mere possession, was not barred by *Teague*). The challenge in *Bousley* was based on the underlying principle of proof beyond reasonable doubt in *In re Winship*, 397 U.S. 358 (1970). *Accord* *Jackson v. Virginia*, 443 U.S. 307 (1979) (requiring prosecution to establish every element of criminal offense with proof sufficient to satisfy reasonable doubt standard when evidence viewed from perspective of a rational trier of fact). The Court declined to apply *Teague* to bar review of the claim, holding that in applying only to “procedural rules,” *Teague*’s new rule doctrine did not preclude review of claims based on the Court’s interpretation of a “criminal statute enacted by Congress.” *Bousley*, 523 U.S. at 620.

93. *Teague v. Lane*, 489 U.S. 288, 315 (1989).

94. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

95. *Teague*, 489 U.S. at 310. Justice O’Connor wrote the opinion for a plurality of the Court; Justice White concurred in the judgment only; Justice Blackmun wrote a separate opinion concurring in part and in the judgment in which Justice Stevens concurred, while also concurring in a separate opinion written by Justice Stevens. *Id.* at 317–18. Justice Stevens specifically noted his agreement with a critical part of Justice Brennan’s dissenting opinion, in which Justice Marshall joined. *Id.* at 326.

Griffith, the Court held that all new rules announced by the Court would apply to benefit those state and federal litigants that preserved similar claims in pending litigation at the time the “new” rule is announced.⁹⁶ In so doing, *Griffith* held that the direct appeal process for state court prosecutions would extend through the conclusion of the certiorari process in the Court.⁹⁷

Griffith, thus, adopted a very straightforward basis for adopting a policy favoring the filing of the certiorari petition in the Supreme Court for review of adverse rulings on federal constitutional issues by state courts. The Court drew a bright line distinction in holding that decisions announced by the Court adopting new rules of federal constitutional criminal procedure would be applied retroactivity to cases in which the same decision, properly preserved, has been litigated prior to the conclusion of the direct appeal process.⁹⁸

That process includes the denial of the certiorari petition in which the issue is being litigated or upon disposition of the case by the Court when the petition is granted. Once the state court’s decision in a pending case becomes final, the *Griffith* doctrine does not require retroactive application of a new rule announced by the Court, as the Court explained: “By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”⁹⁹ And, once the state court’s decision becomes final, the *Teague* limitation on retroactivity bars application of a favorable new rule to a state defendant petitioner’s claim

Justice Brennan was especially critical of the Court’s disposition of the case without oral argument and full briefing on the dispositive point. *Id.* at 330. It is somewhat difficult to explain how so thinly supported a new rule could dominate the Court’s subsequent jurisprudence with respect to the very critical importance of “new” rules in the development of constitutional criminal procedure doctrine and for disposition of claims raised by individual litigants.

96. *Griffith*, 479 U.S. at 323. *Griffith*’s retroactivity principle extends application of new rules to those cases remaining in the direct appeal process and not final at the time the rule is announced and includes the pendency of a petition for certiorari or time for filing for review by certiorari. *Id.* at 321 n.6.

97. *Id.*

98. *Teague*, 489 U.S. at 328 (“We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.”).

99. *Griffith*, 479 U.S. at 321 n.6 (1987).

that the federal constitutional violation was improperly rejected by the state court or courts considering the issue.¹⁰⁰

The favorable policy for retroactive application of new rules adopted in *Griffith* requires that appellate counsel be aware not only of new decisions issued by the Supreme Court, but also aware of issues pending in lower courts that could eventually be decided favorably for other clients. However, part of the problem posed by *Griffith* is that potential issues that may benefit from retroactive application of the Court's new rulings must be preserved for appellate review in the trial process. This means that trial counsel must be cognizant of potential avenues for relief not just based on common sense, but on the state of litigation nationally in which identical or similar issues are already being considered in state and federal appellate courts.

When the Court announces a new rule that will be applied retroactively in all pending cases before the Court which preserved the same or similar issue, the Court will typically grant the petition, vacate the judgment rendered in the court below, and remand the cause for reconsideration in light of the decision announcing the new rule. This process, commonly referred to as "GVR" permits it to dispose of a number of pending cases without having to apply its new rule to the discrete facts of each case, relying on the lower court to complete the process of review.¹⁰¹ The remand,

100. *Teague*, 489 U.S. at 310 ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

101. The "GVR" process, while seemingly an efficient way for the Court to address pending cases involving issues identical or similar to ones it has decided in a prior case, is not without controversy. For a discussion of this process, see *Stutson v. United States*, 516 U.S. 193, 194–98 (1996) (*per curiam*), referencing the *per curiam* order issued the same day in *Lawrence v. Chater*, 516 U.S. 163 (1996), and signed opinions by Justice Stevens, Chief Justice Rehnquist, and Justice Scalia, joined by Justice Thomas, all of whom discuss the appropriate use of the GVR process. In *Stutson*, the Court explained its rationale for using the process:

[T]his is a case where (1) the prevailing party below, the Government, has now repudiated the legal position that it advanced below; (2) the only opinion below did not consider the import of a recent Supreme Court precedent that both parties now agree applies; (3) the Court of Appeals summarily affirmed that decision; (4) all six Courts of Appeals that have addressed the applicability of the Supreme Court decision that the District Court did not apply in this case have concluded that it applies to Rule 4 cases; and (5) the petitioner is in jail having, through no fault of his own, had no plenary consideration of his appeal. While "we 'should [not] mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error,'" this exceptional combination of circumstances presents ample justification for a GVR order. It appears to us that there is at least

however, does not require the lower court to simply apply the new rule, but rather, the lower court reviews the case again in light of the new rule. For instance, in *McKoy v. North Carolina*,¹⁰² the Court reversed a death sentence because jurors had been instructed that they could only consider the effect of mitigating evidence when weighing aggravating against mitigating circumstances if they had unanimously found the evidence supported mitigation.¹⁰³ The Court found the sentencing process flawed because:

Although the jury may opt for life imprisonment even where it fails unanimously to find any mitigating circumstances, the fact remains that the jury is required to make its decision based only on those circumstances it unanimously finds. The unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a “sentence less than death.”¹⁰⁴

*McNeil v. North Carolina*¹⁰⁵ was pending in the Court when it issued its decision in *McKoy*, leading to the following order in *McNeil*: “The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of *McKoy v. North Carolina*.”¹⁰⁶

The order vacating the judgment of the Supreme Court of North Carolina did not go unnoticed, as Justice Kennedy, joined by Chief Justice Rehnquist, and Justices O'Connor and Scalia dissented from the Court's disposition.¹⁰⁷ While noting that the state supreme court's decision had been issued following the Court's holding in *McKoy* and affirmed by that court based on a decision reversed by the

a reasonable probability that the Court of Appeals will reach a different conclusion on remand, and the equities clearly favor a GVR order.

Stutson, 516 U.S. at 195–96.

102. *McKoy v. North Carolina*, 494 U.S. 433 (1990).

103. *Id.* at 435 (citing *Mills v. Maryland*, 486 U.S. 367 (1988)).

104. *Id.* at 439.

105. *McNeil v. North Carolina*, 494 U.S. 1050 (1990). The Court issued its order on March 26, 1990, while *McKoy* was argued on October 25, 1989, and the decision was delivered on March 5, 1990.

106. *Id.* at 1050.

107. *Id.* (Kennedy, J., dissenting).

Supreme Court,¹⁰⁸ Justice Kennedy pointed to a factual distinction in the two cases. McNeil's trial jury had not been instructed on the same unanimity requirement held unconstitutional in *McKoy*, nor been instructed to find that it could not consider mitigation unless found unanimously.¹⁰⁹ He noted that on remand, the North Carolina Supreme Court would be "free to consider these facts, or any others that may affect the determination whether our opinion in *McKoy* requires alteration of its judgment."¹¹⁰

On remand, however, after ordering supplemental briefing,¹¹¹ the state supreme court held that McNeil's death sentence was impermissibly tainted because jurors potentially would not have given effect to mitigation evidence based on the overall impression created by the unanimity instruction concerning their sentencing verdict.¹¹² On retrial, McNeil plead guilty to the capital charges and was again sentenced to death, which was upheld on the direct appeal.¹¹³ The Supreme Court denied certiorari.¹¹⁴

Griffith implicates the significance of petitioning for certiorari in the Supreme Court. Using *Griffith* as the controlling rule for retroactive application of Supreme Court holdings,¹¹⁵ state supreme courts have used *Griffith* to articulate state policies concerning new rules of state criminal procedure.¹¹⁶

108. See *id.* (referring to the state supreme court's affirmance of McNeil's sentence on the basis of its holding in *State v. McKoy*, 323 N.C. 1 (1988), subsequently reversed by the Court in *McKoy*).

109. *Id.*

110. *Id.*

111. Order, *State v. McNeil*, 391 S.E.2d 816 (N.C. 1990) (No. 37A87).

112. *McNeil*, 395 S.E.2d 106, 110 (N.C. 1990).

113. *McNeil*, 518 S.E.2d 486, 513 (N.C. 1999).

114. *McNeil*, 529 U.S. 1024 (2000).

115. In *Danforth v. Minnesota*, the Court held that state courts were not bound to apply the retroactivity limitations recognized in *Teague v. Lane* as a matter of federal constitutional law and were within their authority to apply decisions announcing new rules of federal constitutional criminal procedure retroactively to in state litigation. *Danforth v. Minnesota*, 552 U.S. 264, 267–69, 291 (2008) (citing *Crawford v. Washington*, 541 U.S. 36 (2004), construed in *Whorton v. Bockting*, 549 U.S. 406 (2007)). See generally J. Thomas Sullivan, *Danforth, Retroactivity and Federalism*, 61 OKLA. L. REV. 425 (2008) (analyzing *Danforth* in light of the Court's decision in *Whorton v. Bockting*, holding *Crawford v. Washington* was not subject to retroactive application in federal habeas actions).

116. *Charles v. State*, 326 P.3d 978, 979 (Ala. 2014) (applying the *Griffith* approach to retroactive application of new rules arising under state law); *Richmond v. State*, 59 P.3d 1249, 1252 (Nev. 2002) (adopting *Griffith* retroactivity rule for state cases announcing new rules under state law); *State v. Tierney*, 839 A.2d 38, 42–44 (N.H. 2003) (following *Griffith* rationale in holding that decision expanding severance right to joined criminal charges should apply retroactively as a matter of state law); *State v. Guard*, 371 P.3d 1 (Utah 2015) (adopting *Griffith* retroactivity rationale as rule governing decisions announced on issues of state law). Most recently, the Supreme Court of Utah explained:

For example, in *Fetterly v. State*,¹¹⁷ the Idaho court applied a state retroactivity rule paralleling *Griffith* in addressing a retroactivity question arising from a change in state law with respect to the decision to impose a death sentence.¹¹⁸ In *State v. Charboneau*,¹¹⁹ the court changed state law by requiring a trial court considering the imposition of a death sentence to reweigh all mitigating circumstances against each aggravating circumstance. The court could only impose the capital sentence if each aggravator outweighed the totality of mitigation.¹²⁰ Fetterly's death sentence was upheld throughout the post-trial process, including appeal,¹²¹ state,¹²² and federal post-conviction proceedings,¹²³ before the announcement of the new rule in *Charboneau*.¹²⁴ He then filed a second petition for post-conviction relief in state court, arguing retroactive application of the *Charboneau* rule required his sentence to be vacated.¹²⁵ The court denied relief and refused to apply the new rule retroactively, noting it had not applied *Charboneau* retroactively to final judgments before its announcement, but that it applied the rule to cases that were still open for sentencing on this date."¹²⁶ The *Fetterly* court's approach was wholly consistent with *Griffith*'s retroactivity doctrine.¹²⁷

Some criticize *Griffith* because of its arbitrary "bright line" cut-off for retroactivity and departing from an approach which considers the potential significance to litigants with finalized cases, but its bright line approach does ensure a measure of consistency in retroactivity decisions. It recognizes the benefit of counsel's—or a *pro se* litigant's—perception of potential changes in the law by timely preservation of error, while rather coldly explaining that

"While we recognize that *Griffith* does not apply directly to non-constitutional changes in criminal procedure, we find its logic equally persuasive in the non-constitutional context. Even in the non-constitutional context, new rules of criminal procedure may implicate a defendant's right to a fair trial." *Guard*, 371 P.3d at 17.

117. *Fetterly v. State*, 825 P.2d 1073 (Idaho 1991).

118. *Id.* at 1074–75.

119. *State v. Charboneau*, 774 P.2d 299 (Idaho 1989).

120. *Id.* at 323.

121. *State v. Fetterly*, 710 P.2d 1202 (Idaho 1985), *cert. denied*, 479 U.S. 870 (1986).

122. *State v. Fetterly*, 766 P.2d 701 (Idaho 1988), *cert. denied*, 492 U.S. 925 (1989).

123. *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990).

124. *Fetterly v. State*, 825 P.2d 1073, 1074–75 (Idaho 1991).

125. *Id.* at 1073.

126. *Id.* at 1074.

127. *Id.* at 1075.

finalized cases will not benefit from an earlier appreciation of the same potential.¹²⁸

C. *The Importance of Teague for Certiorari Practice*

The Court's decision in *Teague* is critical to understanding why certiorari often remains a necessary option for attempting to obtain relief for defendants whose preserved federal constitutional claims have been rejected on the merits by state appellate courts. *Teague* addressed retroactive application of decisions favorable to defendants, changing the landscape of federal constitutional criminal procedure litigation.

1. Retroactivity Prior to *Teague*

Prior to the Court's decision in *Teague*, the Court utilized a three-part test established in *Linkletter v. Walker*¹²⁹ and *Stovall v. Denno*¹³⁰ to determine retroactivity: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."¹³¹

This approach afforded flexibility in the retroactivity determination, but at some cost to certainty and, often, fairness in the application of new constitutional doctrine. This concern prompted Justice Harlan's criticism¹³² of the flexible approach to retroactivity taken in *Linkletter* and

128. The application of *Griffith* may result in a procedurally complicated issue regarding finality, as illustrated in the divided en banc decision of the Washington Supreme Court in *State v. Kilgore*, 216 P.3d 393, 396–401 (Wash. 2009). There, the defendant had successfully challenged his sentence on appeal and the case was remanded, but only for review on certain questions. While pending remand, the U.S. Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296, 313 (2004), where the Court held that, under the Sixth Amendment, enhanced sentencing imposed under state law for offenses committed with "deliberate cruelty" required notice and proof of the enhancement element by reasonable doubt. The divided Court addressed the question of whether the possible continuing exercise of the state trial court's jurisdiction to re-sentence following remand from the direct appeal required a finding that the conviction was not "final," for purposes of retroactive application of *Blakely*, with the majority concluding that Kilgore's conviction was, in fact, final prior to announcement of *Blakely*. *Kilgore*, 216 P.3d at 401. Kilgore had not preserved the *Blakely* claim in his appeal in the state courts. See *id.* at 396 ("Kilgore appealed but did not challenge his exceptional sentence.").

129. *Linkletter v. Walker*, 381 U.S. 618 (1965).

130. *Stovall v. Denno*, 388 U.S. 293 (1967).

131. *Id.* at 297.

132. See *Mackey v. United States*, 401 U.S. 667, 701 (1971) (Harlan, J., concurring in part and dissenting in part) (asserting majority's denial of tax rule retroactivity to set aside petitioner's tax evasion sentence as "so grossly erroneous as to amount to the perpetration of an inexcusable inequity against

supported the adoption of the more restrictive approach in *Teague*. There, Justice O'Connor observed:

[W]e believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished. Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.¹³³

Teague supplanted *Linkletter*'s flexibility with a fixed principle subject to only limited exceptions. In a sense, *Teague* complemented *Griffith* by providing the necessary corollary to *Griffith*'s bright-line rule for retroactive application of new rules to benefit all litigants presenting preserved claims in the direct appeal process. While *Teague* acknowledged that retroactivity should apply in two circumstances, these are clearly limited in application.

The first exception barring retroactive application of new rules does not involve issues of constitutionally-protected procedural rights at all, but rather "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."¹³⁴ This exception embraces substantive rights afforded to criminal defendants by the Constitution.¹³⁵ The second exception recognizes that if a procedural rule is "implicit in the concept of an ordered liberty," even those defendants whose cases are final at the time the rule was announced should benefit from it.¹³⁶ Yet, while accepting the necessity for retroactive application of such

[petitioner] in these circumstances"); *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) ("I have in the past joined in some of those opinions which have, in so short a time, generated so many incompatible and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our effort to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought.").

133. *Teague v. Lane*, 489 U.S. 288, 313 (1989).

134. *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part)).

135. See *supra* Section V.A.

136. *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693).

a rule, the majority clearly expressed its view that such rules were not likely to be discerned in the future.¹³⁷

In contrast to the *Griffith* bright-line rule for retroactivity for pending cases when the “new” rule of constitutional criminal procedure is announced, a far less favorable rule applies to retroactive applications of new rule decisions for individuals whose cases concluded with a direct appeal. Thus, *Teague* held that new rules, those that break with established precedent,¹³⁸ are not applied retroactively for the benefit of defendants whose cases have been finalized through the direct appeal process at the time the new rule is announced.¹³⁹

2. “New” Rules and Rules Dictated by Precedent

Moreover, procedural protections applied through existing Supreme Court precedent are subject to retroactive application when an issue before a court requires resolution that essentially cannot be distinguished from those circumstances in which a rule has already been announced. For instance, in *Maynard v. Cartwright*,¹⁴⁰ the Court considered

137. *Id.* Perhaps the most likely development of a procedural rule that would qualify for retroactive application would relate to admissibility of newly-discovered scientific evidence of the convicted defendant's factual or legal innocence, such as DNA evidence exculpating the defendant, or raising a reasonable doubt as to the guilt of another individual. The substantial number of exonerations resting on newly-discovered or newly-available DNA evidence would seem to demonstrate the procedural rules exception to *Teague*, essential to an “accurate determination of guilt or innocence.” *Id.* at 313. To date, the Court has not recognized a procedural or evidentiary rule as necessitating retroactive application, perhaps because the power of such exculpatory evidence has been addressed through clemency or lower court litigation not reaching the Supreme Court.

138. *See id.* at 301 (“[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction was final.”).

139. *Id.* at 310. Justice O'Connor, writing for a plurality concluded: “Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” *Id.* Some state courts have adopted the *Teague* retroactivity approach in applying new rules recognized under state constitutional interpretations or judicial decisions as matters of state law. *See Jones v. State*, 122 So. 3d 698, 701 (Miss. 2013), *cert. granted*, 285 So. 3d 626 (2019) (“This Court expressly has adopted *Teague*'s ‘very limited retroactive application standard.’”); *In re New Hampshire*, 103 A.3d 227, 236 (N.H. 2014) (concluding that, pursuant to the *Teague* framework, the rule announced in *Miller v. Alabama* constitutes a new substantive rule of law that applies retroactively to cases on collateral review); *Ex parte Maxwell*, 424 S.W.3d 66, 71 (Tex. Crim. App. 2014) (“[W]e follow *Teague* as a general matter of state habeas practice.”). States remain free, however, to reject or adopt *Teague* retroactivity analysis as a matter of state law. *See, e.g., Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (“[I]n the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status.” (emphasis added)).

140. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

whether a statutory aggravating circumstance which was “especially heinous, atrocious or cruel”¹⁴¹ was appropriately limited in its wording to warrant the sentencer to distinguish between non-capital offenses and capital offenses justifying the imposition of a death sentence.¹⁴² In *Godfrey v. Georgia*,¹⁴³ the Court held the use of a statutory aggravating circumstance authorized the imposition of a death sentence based upon similar language. There, the jury was permitted to impose a capital sentence upon finding that the offense “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,”¹⁴⁴ phrasing which could reasonably be applied to virtually any murder.¹⁴⁵ The *Cartwright* Court held that *Godfrey* controlled¹⁴⁶ and remanded for further proceedings to determine the appropriate sentence.¹⁴⁷

Subsequently, in *Stringer v. Black*,¹⁴⁸ the Court considered a Mississippi death row inmate’s claim that his sentence should be set aside where state law permitted the prosecution to rely on a statutory aggravating circumstance substantially the same as those held unconstitutional in *Godfrey* and *Cartwright*.¹⁴⁹ The Court concluded that the relief claimed did not constitute reliance on new rule because reasonable jurists would have anticipated the rule as either dictated by or a logical extension of existing precedent. The statutory reference to the capital murder being “especially

141. The aggravating circumstance was authorized by OKLA. STAT. tit. 21 § 701.12(2), (4) (1981).

142. *Maynard*, 486 U.S. at 363–65. Oklahoma argued that the statutorily authorized aggravating circumstance did not suffer from the same imprecise terms of affording notice to an offender of which offenses would result in a capital sentence, because the state court had limited its application to cases in which the victim had been tortured. The Court noted that the state court referred to “torture” as an evidentiary factor, demonstrating that whether the offense was “especially heinous, atrocious or cruel” did not expressly limit the aggravating circumstance to cases in which torture had been demonstrated. *Id.*

143. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

144. *Id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

145. *See id.* at 428–29 (“A person of ordinary sensibility could fairly characterize almost every murder as “outrageously or wantonly vile, horrible and inhuman.”).

146. *Maynard*, 486 U.S. at 363–64.

147. *Id.* at 365–66.

148. *Stringer v. Black*, 503 U.S. 222 (1992).

149. *Id.* at 228.

heinous,”¹⁵⁰ the same ill-defined concept condemned in *Godfrey*,¹⁵¹ was critical to the decision, even though the language of the Mississippi statutory aggravator was not identical to the language of Georgia’s statutory aggravator. The Court explained:

In the case now before us Mississippi does not argue that *Maynard* itself announced a new rule. To us this appears a wise concession. *Godfrey* and *Maynard* did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case. In applying *Godfrey* to the language before us in *Maynard*, we did not “brea[k] new ground.” *Maynard* was, therefore, for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule.¹⁵²

Thus, the *Teague* Court’s differentiation between those cases resting on precedent and those requiring announcement of a new rule of constitutional criminal procedure proved critical in the dispositions in *Maynard* and *Stringer* because rules dictated by precedent are not new and, thus, not subject to *Teague*’s restrictive retroactivity doctrine.¹⁵³

3. Exceptions to *Teague*’s General Rule Precluding Retroactivity and Effective Assistance of Counsel

In *Teague*, the Court recognized two classes of exceptions to the usual operation of the non-retroactivity principle generally attending the articulation of new rules of constitutional criminal procedure. The first accords retroactive application to new rules that restrict the authority of government to proscribe particular types of conduct or impose specific forms of punishment against defendants based on their status or the nature of the offense.¹⁵⁴ For instance, certain mentally retarded individuals¹⁵⁵ or juveniles under the age of eighteen at the time of the offense¹⁵⁶ cannot be

150. The statutory aggravating circumstance supported a death sentence if the jury found that: “The capital murder was especially heinous, atrocious or cruel.” *Id.* at 226.

151. *Godfrey*, 466 U.S. at 428–29.

152. *Stringer*, 503 U.S. at 228–29.

153. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

154. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 330 (1990).

155. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

156. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

executed consistently with the commands of the Eighth Amendment,¹⁵⁷ and require retroactive application. The second exception, provides for retroactive application of new rules that are said to be “implicit in the concept of ordered liberty.”¹⁵⁸ The Court explained that the class of rules fitting within this exception are those which ensure fundamental fairness and accuracy in the fact-finding process.¹⁵⁹

Bearing *Teague* in mind, counsel must consider whether the case involves correction of an error based on existing precedent, requires the reviewing court to expand upon that precedent, or necessitates the issuance of a new rule to resolve the issue in the client’s favor. *Teague* is always an essential consideration when a petitioning defendant must rely on federal courts to overcome a state court decision on the merits of the federal constitutional claim of error. If the issue, or the state court’s disposition of the issue, requires expansion of existing precedent or announcement of a new rule, then petitioning for certiorari in the Supreme Court is a necessary consideration for appellate counsel in providing the most effective representation possible for the client. While the indigent client has no Sixth Amendment right to representation by appointed counsel in the certiorari process under *Ross v. Moffitt*,¹⁶⁰ circuit policy may dictate that counsel pursue meritorious claims through the certiorari process.¹⁶¹

VI. PROCEDURAL CONTEXTS IN WHICH THE CERTIORARI PETITION IS CRITICAL

There are at least five circumstances in which the decision to petition for review by writ of certiorari in the United States Supreme Court may prove critical for advancing the right of a criminal defendant convicted or sentenced in a state court proceeding for resolution of the claims of federal

157. U.S. CONST. amend. VIII provides in pertinent part: “...nor cruel and unusual punishments inflicted.”

158. *Teague*, 489 U.S. at 311.

159. *Id.* at 312–13.

160. *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974).

161. In *Wilkins v. United States*, the Court noted that, pursuant to the Criminal Justice Act, all circuits had adopted policies requiring appointed counsel to assist the indigent litigant in petitioning for certiorari in the Supreme Court. *Wilkins v. United States*, 441 U.S. 468, 469 (1979) (citing 18 U.S.C. § 3006A). Subsequently, in *Austin v. United States*, the Court recognized counsel’s difficulty in being obligated to file certiorari petitions that lack merit. *Austin v. United States*, 513 U.S. 5, 7–9 (1994); *See supra* text accompanying note 18.

constitutional violations arguably tainting the fairness of the criminal prosecution. In each situation, certiorari offers either the only, or best, opportunity to obtain relief on the alleged constitutional violation. The alternative option for litigating those claims through federal habeas corpus offers little or no potential for relief for state petitioners.

A. *Securing the Retroactive Application of New Rules under Griffith*

The *Griffith* retroactivity doctrine offers relief to those criminal defendants whose cases were decided under then-existing procedural rules that were subsequently altered by the Supreme Court's announcement of a new rule of constitutional criminal procedure. *Batson v. Kentucky*¹⁶² is an example of *Griffith* in operation. In *Batson*, the Court changed the process for challenging claims of racially discriminatory usage¹⁶³ of peremptory challenges in criminal trials.¹⁶⁴ Previously, in *Swain v. Alabama*,¹⁶⁵ the Court required defendants to demonstrate a pattern of discriminatory peremptory strikes by a prosecutor's office in removing minority venirepersons from jury service,¹⁶⁶ a requirement that had proved extremely difficult to meet for defendants in individual cases.¹⁶⁷

The *Batson* Court adopted an approach that required the defendant to first show membership in a "cognizable racial group" and that the prosecutor had used peremptory challenges to exclude prospective jurors from service.¹⁶⁸ Second, the prosecutor must then respond with a racially neutral basis for the exercise of the peremptory strike.¹⁶⁹ Finally, once the defendant has made the threshold showing that a reasonable inference of racially discriminatory intent explains the prosecutor's use of their peremptories and the prosecutor has offered an arguably racially neutral

162. *Batson v. Kentucky*, 476 U.S. 79 (1986).

163. The Court had long held that racial discrimination in excluding jurors on the basis of race violated the Fourteenth Amendment. *Martin v. Texas*, 200 U.S. 316, 321 (1906); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

164. *Batson*, 476 U.S. at 94–98, 100; *Martin*, 200 U.S. at 321; *Strauder*, 100 U.S. at 305.

165. *Swain v. Alabama*, 380 U.S. 202 (1965).

166. *Id.* at 203–04.

167. *Batson*, 476 U.S. at 92–93 (describing *Swain* procedure as "crippling").

168. *Id.* at 96.

169. *Id.* at 97. Mere denial of racially discriminatory intent, however, is not sufficient to demonstrate bias on the prosecutor's part. *Id.* at 94 (citing *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

basis for their strike, the trial court must decide whether the defendant has met the burden of proving “purposeful discrimination.”¹⁷⁰

Adoption of the *Swain* approach addressed the difficulty posed for defendants lacking information to demonstrate a systematic use of peremptory strikes by prosecutors to exclude eligible minority jurors from service. Following *Batson*, the use of a peremptory strike to exclude even a single minority juror in an individual criminal case may be challenged.¹⁷¹ Moreover, subsequent decisions have expanded reliance on *Batson* based on its theoretical foundation in the equal protection guarantee of the Fourteen Amendment, addressing the right of venirepersons not to be excluded from jury service.¹⁷² The Court has extended *Batson* to provide for challenges by white defendants as to the exclusion of minority jurors¹⁷³; behalf of third parties in civil actions¹⁷⁴; based on race of prospective jurors by defendants in criminal cases¹⁷⁵; and to use of peremptories in discriminatory fashion based on gender.¹⁷⁶

The functional application of the *Griffith* retroactivity rule is illustrated by

170. *Id.* at 90–91.

171. *Id.* at 96 (“These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.”). In *United States v. Moore*, the court expanded on its rationale for extending *Batson* to military trials:

The en banc Court of Military Review in this case simplified the inquiry into just one part, adopting a *per se* rule as establishing a prima facie case of discrimination. Upon the Government’s use of a peremptory challenge against a member of the accused’s race and upon timely objection, trial counsel must give his reasons for the challenge. Today, we adopt a *per se* rule for all the services.

We do so in order to simplify this process for members of courts-martial and, more importantly, to make it fairer for the accused. In military trials, it would be difficult to show a “pattern” of discrimination from the use of one peremptory challenge in each court-martial. As a matter of judicial administration, the *per se* rule has become recognized as the superior procedure for *Batson* challenges.

United States v. Moore, 28 M.J. 366, 368 (1989), *reversed*, 30 M.J. 162 (1990) (emphasis added).

172. See, e.g., *Batson*, 476 U.S. at 87 (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

173. *Powers v. Ohio*, 499 U.S. 400, 415–16 (1991).

174. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628–30 (1991).

175. *Georgia v. McCollum*, 505 U.S. 42, 55 (1992).

176. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

two decisions ultimately relying on *Batson* for the precedent controlling their disposition. In Texas capital case *Miller-El v. State*,¹⁷⁷ the appeal of a death penalty sentence was pending in the Texas Court of Criminal Appeals some two years after the court issued its decision in *Batson*. Miller-El raised a *Batson* claim in the direct appeal, arguing of the exclusion of minority jurors based on ethnicity in the prosecutor's use of peremptory challenges. The state court noted¹⁷⁸ that it previously recognized the applicability of *Batson* in another capital case, *DeBlanc v. State*¹⁷⁹:

The ruling in *Batson* has been deemed to have retroactive effect to those cases pending on direct review or not yet final at the time of the ruling. So although the instant case was tried prior to the Supreme Court's decision in *Batson*, because it was pending on direct appeal at the time of the ruling, *Batson* is applicable.¹⁸⁰

The critical question before the court was whether Miller-El had preserved the *Batson* claim. In order to obtain the benefit of a new rule, relying on the *Griffith* retroactivity principle, the litigant must have preserved the error in order to claim relief from the *new* rule. A failure to properly preserve error and frame the issue to bring it within the ambit of the *new* rule theoretically might preclude its retroactive application.¹⁸¹ But the

177. *Miller-El v. State*, 748 S.W.2d 459 (Tex. Crim. App. 1988).

178. *Id.* at 460.

179. *DeBlanc v. State*, 732 S.W.2d 640 (Tex. Crim. App. 1987).

180. *Id.* at 641.

181. For instance, in *Whiteside v. State* the Arkansas Supreme Court considered whether the appellant's life-without-parole sentence imposed for a capital murder, committed while he was seventeen years old, was unconstitutional based on *Miller v. Alabama*. *Whiteside v. State (Whiteside I)*, 383 S.W.3d 859 (Ark. 2011), *vacated*, 567 U.S. 950 (2012), *remanded to* *Whiteside v. State (Whiteside II)*, 426 S.W.3d 917 (Ark. 2013); *Miller v. Alabama*, 567 U.S. 460, 479 (2012). *Whiteside I* was pending on certiorari at the time the Court issued its decision in *Miller*, and the Court ordered *Whiteside*'s sentence vacated and remanded to the state court for reconsideration in light of the decision in *Miller*. *Whiteside I*, 383 S.W.3d 859.

On remand, the State argued that *Whiteside* was not entitled to the benefit of *Miller* because the Court concluded that imposition of a mandatory life-without-parole sentence under state law violated the Eighth Amendment and *Whiteside*, rather than challenging the mandatory sentencing, argued a life-without-parole sentence was inapplicable when the offender was a juvenile at the time of the offense. *Whiteside II*, 426 S.W.3d at 919. The court rejected this line of argument, explaining:

We disagree that *Whiteside* failed to properly preserve this issue, as he argued, both at trial and in *Whiteside I* that a life sentence without parole under the circumstances of his case was unusual,

Texas court ruled the *Batson* claim had effectively been preserved based on trial counsel's pre-trial motion to quash the indictment based upon "exclusion of blacks from the jury panel,"¹⁸² explaining:

After the hearing, the trial court refused to quash the indictment. In this cause, it can be argued that appellant had a *Batson*, hearing on his motion to quash the jury that heard his case. However, given the fact that *Batson* was not decided until after the case at bar had been tried to completion in the trial court, and given the testimony that transpired at the hearing, we believe such an argument would border on being *specious*.

We find that on the facts of this case, appellant sufficiently raised the issue of the State's use of its peremptory strikes at trial to invoke *Batson* protections on appeal.¹⁸³

Once the court concluded that the *Batson* claim was preserved by sufficient objection at trial,¹⁸⁴ the record supported its ordered remand permitting the trial court to determine whether the prosecution had offered race-neutral explanations for its peremptory challenges of minority jurors or

excessive, and in violation of his rights under the Eighth Amendment to the United States Constitution.

However, regardless of whether Whiteside properly preserved his *Miller* claim, we agree with his assertion that the imposition of a void or illegal sentence is subject to challenge at any time. Sentencing in Arkansas is entirely a matter of statute, and where the law does not authorize the particular sentence imposed by a trial court, the sentence is unauthorized and illegal. According to the Supreme Court's decision in *Miller*, the mandatory life-without-parole sentence that Whiteside received pursuant to Ark. Code Ann. § 5-10-101(c) is illegal under the Eighth Amendment to the United States Constitution. Thus, because the issue in this case involves a void or illegal sentence, it can be addressed for the first time on appeal.

Furthermore, by its argument that we should not address Whiteside's *Miller* claim, the State ignores precedent holding that when a Supreme Court decision results in a "new rule," that rule applies to all criminal cases still pending on direct review.

Id. at 919 (citing *Schiro v. Summerlin*, 542 U.S. 348, 351 (2014)).

182. *Miller-El*, 748 S.W.2d at 460.

183. *Id.* (emphasis added).

184. *See id.* ("[A]ppellant clearly objected to the prosecutor's use of peremptory strikes. After the hearing to quash the indictment, the trial court overruled the appellant's motion on the jury selection issues by noting that the appellant failed to demonstrate systematic exclusion of black veniremen by the Dallas County District Attorney's Office.").

whether the evidence demonstrated purposeful discrimination by the State in the use of any of its strikes.¹⁸⁵

The litigation in *Batson* and subsequent decisions demonstrates how the Court's announcement of a *new* rule of constitutional criminal procedure may expand the potential for relief afforded to criminal defendants whose defenses may arguably fare better under that change in the law during the pendency of those cases. Thereafter, of course, the new rule will apply to criminal actions filed or prosecuted after its announcement and will serve as binding precedent on all lower courts. For those litigants urging preserved claims falling within the ambit of the new rule, the *Griffith* retroactivity principle serves to benefit those defendants whose cases have not been finalized prior to its announcement. It also rewards diligent lawyering by counsel who have preserved claims ultimately decided favorably in other cases when new rules can be relied upon to benefit their clients.

Importantly, for counsel making the decision to petition for certiorari, in *Greene v. Fisher*¹⁸⁶ the Court explained that the *Griffith* retroactivity doctrine was not codified in the federal habeas revisions requiring petitioners to overcome a presumption of regularity in state court rulings on federal constitutional claims.¹⁸⁷ While a petitioner may expect full retroactive application of a new rule with respect to the same issue properly preserved, while the case is still alive in the direct appeal process,¹⁸⁸ the starting point for federal habeas relief requires a showing that the state court decision fails to qualify for deference in the federal habeas process.

Thus, in a Section 2254 action, the state court defendant petitioning for relief from a rejection of his federal constitutional claim in state proceedings must show that either the state court ruling resulted in a determination contrary to or reflecting an unreasonable application of Supreme Court precedent, or unreasonable in light of the factual record.¹⁸⁹ Even though *Griffith* affords retroactivity while a case remains active, the federal habeas standard for relief does *not* apply to state court decisions preceding the announcement of the new rule.¹⁹⁰

185. *Id.* at 460–61.

186. *Greene v. Fisher*, 565 U.S. 34 (2011).

187. *Id.* at 39–40.

188. *Griffith v. Kentucky*, 479 U.S. 314, 321 (1987).

189. 28 U.S.C. § 2254(d) (2018). For text of Subsection (d)(1), see *supra* note 4.

190. “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the prisoner’s claim on the merits. We said that the provision’s ‘backward-looking language

Thus, in deciding whether to file the certiorari petition seeking to benefit from a potentially favorable decision from the Court that would provide relief for the individual litigant, counsel cannot assume that the same option for obtaining relief would later be available in a federal habeas action. *Greene v. Fisher* clearly authorizes federal habeas relief if the state court determination was unreasonable in light of “clearly established Federal law, as determined by the Supreme Court of the United States[.]”¹⁹¹ then-existing precedent at the time of the state court’s issuance of its ruling.¹⁹² If the state court ruling preceded the issuance of a decision announcing a new rule favorable to the litigant, the state court determination must be shown to have been unreasonable in light of existing precedent. Virtually by definition, the fact that it is the *new* rule that provides relief, the previously issued decision of the state court based upon prior precedent would likely not be unreasonable, so long as it reasonably reflected then-existing state law.

While retroactivity under *Griffith* would provide relief on the same claim as that previously rejected by the state court, relief is only available if the claim is preserved and presented through later action in the direct appeal process, including the certiorari petition filed in the Supreme Court. A decision to delay presentation of the claim in a later-filed federal habeas corpus action will almost certainly forfeit the relief that would have been available had the certiorari petition been pursued to complete the direct appeal process.

B. *Relief Requires Recognition of a New Rule of Constitutional Criminal Procedure*

Not only did the Court draw a line in determining retroactive application of its holdings based on whether a rule applied in a decision was “new” or one dictated by existing precedent in *Teague*, it also reserved the development of constitutional criminal procedural rules for itself, rather than permitting lower federal courts to articulate new rules or applications

requires an examination of the state-court decision at the time it was made.” *Greene*, 565 U.S. at 44 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011)); *see also* *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (discussing the unreasonable application of the Supreme Court’s new rule on proportionality of sentences announced in *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

191. 28 U.S.C. § 2254(d).

192. *Greene*, 565 U.S. at 44 (citing 28 U.S.C. § 2254(d)).

in the federal habeas process.¹⁹³ Thus, a constitutional claim requiring application of a new rule must be announced by the Supreme Court. Certiorari, rather than federal habeas, is the vehicle for pursuing relief that requires recognition of a change in the law expressed in the adoption of a new rule.¹⁹⁴

The New Rules doctrine also precludes federal circuit and district courts from expanding upon rules announced by the Court or applying existing rules to novel situations. For instance, in *Caspari v. Bohlen*,¹⁹⁵ the Court held that the Eighth Circuit violated the principle that a failure of proof in a non-capital sentencing proceeding would bar imposition of a greater sentence in a remanded re-sentencing proceeding.¹⁹⁶ In reversing, the Court rejected the Eighth Circuit's articulation of what amounted to a new rule by adopting a position—still in controversy among courts—that considered whether the non-capital re-sentencing process should logically

193. See, e.g., *Goeke v. Branch*, 514 U.S. 115, 120–21 (1995) (discussing the idea that federal habeas courts cannot announce new rules of constitutional criminal procedure following *Teague*). However, the Court's authority to announce new rules has not always been absolute. In *Estelle v. Smith*, the Court upheld the federal habeas court's decision that found admission of a court-appointed forensic psychiatrist's testimony of the accused's "future dangerousness" a key issue in the Texas capital sentencing process, violating Smith's right to counsel. *Estelle v. Smith*, 451 U.S. 454, 456 (1981). Smith's lawyer had not been notified that the forensic evaluation, purportedly made for the purpose of assessing competency for trial, would involve a determination on the question for imposing the death sentence. *Id.* at 461. The federal habeas court found the failure to notify counsel to be a violation of Smith's rights to remain silent and to assistance of counsel under the Fifth and Sixth Amendments. *Id.* at 469. This idea was affirmed in Texas state courts, as well as the Fifth Circuit. *Smith v. Estelle*, 445 F. Supp. 647, 655, 665 (N.D. Tex. 1977), *cert. granted*, 445 U.S. 926 (1980), *aff'd*, 451 U.S. 454 (1981) (characterizing use of psychiatrist's testimony as "surprise" and "cloak and dagger"); cf. *Reese v. Wainwright*, 600 F.2d 1085, 1091, 1093 (5th Cir. 1979) (holding competent appellant failed "to meet his habeas burden of producing facts that positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to his actual competency during trial" because trial court did not deny procedural due process right to psychological evaluation *prior* to sentencing), *cert. denied*, 444 U.S. 983 (1979). The issue of whether the habeas court had authority to announce a new rule—assuming the rule regarding the limited authority given federal circuit courts—was not addressed, perhaps because *Smith* pre-dated *Teague*.

194. In *Penry v. Lynaugh*, the Court explained that "[u]nder *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). The two exceptions are those found in 28 U.S.C. § 2254(d)(1).

195. *Caspari v. Bohlen*, 510 U.S. 383 (1994), *rev'g* 979 F.2d 109 (8th Cir. 1992).

196. *Id.* at 396–97. The Eighth Circuit reasoned it would only be a "short step" to extend the *Bullington* rule to successive non-capital sentences; such an extension would demand that double jeopardy preclude courts from re-sentencing a defendant to greater terms in non-capital cases where the initial sentence is reversed based upon failure of proof. *Bohlen v. Caspari*, 979 F.2d at 113.

parallel the protections afforded in capital cases under *Bullington v. Missouri*.¹⁹⁷

Perhaps ironically, the process of analogical reasoning—the most common tool for building precedent and deriving new legal theory—precludes federal circuit courts of appeal from contributing to the development of constitutional doctrine. The Court’s reasoning in *Caspari* effectively denies intermediate federal courts from developing new common law theories. Inasmuch as the Court actively protects its preeminence in the development of federal constitutional law, in *Michigan v. Long*¹⁹⁸ the Court followed a similar approach to experimentation in the federal courts in the habeas corpus process.¹⁹⁹ The Court’s authority to discern the limits of federal constitutional protections at issue in state criminal prosecutions has notably contributed to the development of state constitutional law; this reservation of authority has influenced the expansion of state constitutional law theory as an independent option for claims subject to review under either federal or state constitutional provisions, as well as protections afforded to criminal defendants under state law or rules.²⁰⁰

The importance of certiorari for the development of novel legal theory is aptly illustrated by the revolution in pleading reflected in the Supreme Court’s landmark decision in *Apprendi v. New Jersey*,²⁰¹ and its lesser-known

197. *Caspari*, 510 U.S. at 393–96 (noting the court of appeals admitted it was a “stretch” to extend the rule applied in capital sentencing process to non-capital sentencing contexts). Subsequently, in *Monge v. California*, the Court rejected the Eighth Circuit’s reasoning in *Caspari* and held that Fifth Amendment double jeopardy protections do not bar an increase in a non-capital sentence on remand following a failure of proof in the original sentencing proceeding. *Monge v. California*, 524 U.S. 721, 734 (1998).

198. *Michigan v. Long*, 463 U.S. 1032 (1983).

199. The Court adopted a peremptory approach in the assertion of certiorari jurisdiction in response to reliance on “adequate and independent” state law grounds as the basis for a state court’s decision.

[I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, *we merely assume* that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Id. at 1042 (emphasis added) (citation omitted).

200. *See supra* Part III.

201. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

precedent, *Jones v. United States*.²⁰² Under the New Jersey statute reviewed in *Apprendi*, commission of a criminal offense with the purpose of intimidating others “because of race, color, gender, handicap, religion, sexual orientation or ethnicity”²⁰³ would expose the accused to an enhanced sentence of ten to twenty years.²⁰⁴ The Court addressed whether the imposition of the enhanced penalty required a jury or bench finding of the accused’s intent based on evidence sufficient to prove the intent beyond a reasonable doubt.²⁰⁵

The *Apprendi* Court relied on *Jones*,²⁰⁶ issued the year before, in which the Court explained: “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, *any fact* (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”²⁰⁷

The *Apprendi* Court extended this requirement to state prosecutions, effectively expanding the basic concept of the Sixth Amendment notice requirement²⁰⁸ beyond the traditional rule that the charging instrument need only establish the jurisdiction of the trial court; afford the accused notice of the accusation in broad terms; and sufficient to permit the accused to plead the judgment of conviction or acquittal in bar of a successive prosecution. In *Hamling v. United States*,²⁰⁹ an obscenity prosecution, the Court explained:

202. *Jones v. United States*, 526 U.S. 227 (1999).

203. *Apprendi*, 530 U.S. at 496 n.20 (quoting N.J. STAT. ANN. § 2C:44-3(e)).

204. *See id.* at 552 (discussing the sentencing impact of the New Jersey statute on individuals convicted of unlawful weapons possession).

205. *Id.* at 469.

206. *Id.* at 476.

207. *Jones*, 526 U.S. at 243 n.6 (emphasis added).

208. The Sixth Amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the . . . right . . . to be informed of the nature and cause of the accusation.” U.S. CONST. amend. VI.

209. *Hamling v. United States*, 418 U.S. 87 (1974). The significance of *Hamling* arose from the petitioner’s claim that the definition of ‘obscenity’ was so vague it deprived him of notice and, therefore, he could not have known the material he possessed was in fact obscene prior to a judicial determination. *Miller v. California*, 413 U.S. 15, 27, 32–33 (1973). The *Hamling* Court also noted that *Miller* would retroactively apply to cases still pending on direct appeal, predating adoption of the formal rule regarding retroactivity announced in *Griffith*. *Hamling*, 418 U.S. at 102.

Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’ Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.²¹⁰

Otherwise, the Court had apparently spent little energy considering the notice requirement under the Sixth Amendment. However, in *Lankford v. Idaho*,²¹¹ the Court held that with respect to capital cases, the accused was entitled to notice that he faced the prospect or possibility of a death sentence upon conviction. There, the prosecution expressly indicated it would not seek a death sentence and there was no formal notice regarding the possibility of capital sentencing,²¹² but the trial court proceeded to impose a death sentence upon conviction. The majority concluded that reversal was required because the lack of notice “created an impermissible risk that the adversary process may have malfunctioned in this case.”²¹³

An interesting aspect of the *Hamling* formulation lies in its reference to the Court’s prior decision in *United States v. Hess*,²¹⁴ where the Court also pointed out that the charging instrument, “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.”²¹⁵ It is unclear whether the *Hess* Court’s concern with sufficiency of fact pleading continues to be reflected in the general approach to sufficiency of the charging instrument. For instance, in *United States v. Wyatt*,²¹⁶ the Eighth Circuit explained:

210. *Hamling*, 418 U.S. at 117–18 (citations omitted).

211. *Lankford v. Idaho*, 500 U.S. 110 (1991).

212. *Id.* at 111–12.

213. *Id.* at 127. The majority did not, however, reference the notice requirement of the Sixth Amendment in reaching its conclusion.

214. *United States v. Hess*, 124 U.S. 483 (1888).

215. *Id.* at 487.

216. *United States v. Wyatt*, 853 F.3d 454 (8th Cir. 2017).

The criteria we use to assess the adequacy and clarity of an indictment have been repeatedly expressed in our cases:

“An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution.”²¹⁷

Notice of the *factual* basis for the charge may not be charged with specificity, but instead is supplied through the filing of a motion requesting a “bill of particulars,”²¹⁸ seeking greater specificity from the prosecutor in pleading her theory of the case and facts supporting the charging instrument.²¹⁹ It does not serve to provide a means for discovery, however, but only expands upon the information necessary to render the charging instrument legally sufficient.²²⁰ Otherwise, indictment law does not address the defendant’s interest in obtaining information about the prosecution’s evidence in order to prepare the defense as a matter of the Sixth Amendment’s notice guarantee, leaving investigations supporting the

217. *Id.* at 457 (citation omitted) (quoting *United States v. Fleming*, 8 F.3d 1264, 1265 (8th Cir. 1993)); *see also* *Estes v. State*, 442 S.W.2d 221, 223 (Ark. 1969) (discussing the need for information setting forth title of prosecution, name of court, county in which alleged offense committed, and name of defendant sufficient despite absence of factual allegations); *State v. Jackson*, 980 N.E.2d 1032, 1035 (Ohio 2012) (“An indictment meets constitutional requirements if it ‘first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.’” (quoting *State v. Childs*, 728 N.E.2d 379, 386 (Ohio 2000))).

218. FED. R. CRIM. P. 7(f) (“The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.”).

219. *E.g.*, *United States v. Salazar*, 485 F.2d 1272, 1278 (2d Cir. 1973) (“[P]rincipal function of a bill of particulars is to apprise defendant of the essential facts of the crime for which he has been indicted, especially in instances where the indictment itself does little more than track the language of the statute allegedly violated.”).

220. *E.g.*, *United States v. Ordaz-Gallardo*, 520 F. Supp. 2d 516, 521–22 (S.D.N.Y. 2007) (“A bill of particulars is not an investigative tool, or a tool of discovery, but rather ‘is meant to apprise the defendant of the essential facts of a crime and should be required only where the charges of an indictment are so general that they do not advise a defendant of the specific acts of which he is accused.’” (quoting *United States v. Perez*, 940 F. Supp. 540, 550 (S.D.N.Y. 1996))).

development of the defense to the discovery process.²²¹

Apprendi does not address sufficiency of factual pleading in terms of the defendant's need for discovery in order to prepare the defense, except to the limited extent the accused is afforded notice that the prosecution will seek an enhanced sentence upon conviction based on a prohibited motivation for the offense. Instead, the decision and its line of cases focus on the prosecution's burden of proof of the enhancement allegation. The *Apprendi* Court's *notice* demand deals with the nature of the accusation, specifically when the accusation itself involves an enhanced punishment once the prosecution meets its burden of proving the defendant acted with the prohibited *motivation*—as opposed to the *criminal intent* or degree of *culpability* required for commission of the offense.²²² A greater statutorily imposed penalty is warranted when an offender acts with the prescribed motivation.

Apprendi announced a new rule of federal constitutional criminal procedure because it shifted the responsibility for determination of sentencing enhancement facts arising in the context of the proof of the offense itself, as opposed to habitual sentencing enhancement. Instead of the trial court making this determination as the sentencing authority in most jurisdictions,²²³ the responsibility is assigned to the trier of fact on the question of guilt, whether the jury or trial court. For instance, in *Jones*, the

221. FED. R. CRIM. P. 16. Rule 16 governs the discovery process in federal prosecutions. There is no general discovery process afforded to the defense as a matter of Sixth Amendment protection. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

222. The Model Penal Code recognizes a hierarchy of criminal intent with the highest degree of culpability, or criminal responsibility, being that the individual acted “purposefully,” “knowingly,” “recklessly,” or with “negligence,” demonstrating the degree to which the accused intended the results of their act or acted without regard to the consequences of the act done. MODEL PENAL CODE § 2.02(2)(a)–(d) (AM. LAW INST. 2007).

223. Six states employ systems of jury sentencing in non-capital cases: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. ARK. CODE ANN. § 5-4-103 (West 2017); KY. REV. STAT. ANN. § 532.055 (West 2016); MO. ANN. STAT. § 557.036 (West 2012); OKLA. STAT. ANN. tit. 22, § 926.1 (West 2003); TEX. CODE CRIM. PROC. ANN. art. 37.07; VA. CODE ANN. § 19.2-295 (West 2007). Melissa Carrington, *Applying Apprendi to Jury Sentencing: Why State Felony Jury Sentencing Threatens the Right to a Jury Trial*, 2011 U. ILL. L. REV. 1359, 1360 n.2 (2011). However, jury sentencing, whether mandatory or at the accused's option, is now required in cases in which the death penalty may be imposed upon conviction. *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (concluding capital sentencing which allows a state judge, rather than a jury, “to find the facts necessary to sentence a defendant to death” violates *Apprendi* and the Sixth Amendment right to jury trial).

Court explained that the enhancement issue must be submitted to the jury, although the court otherwise imposes sentence in a federal prosecution.²²⁴

The *Jones–Apprendi* rule reflected an approach not dictated by the Court's precedent. The statutory peculiarities in the two cases proved significant, particularly in terms of the ruling in *Apprendi*. The *Jones* Court addressed the question of proof required to impose a sentence authorized under the federal carjacking statute²²⁵ when the facts show a statutory aggravating factor included in the definition of the offense. The Court opened the door to the discussion of sentencing authority that would ultimately lead to the *Apprendi* rule:

Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. Accordingly, some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors.²²⁶

In *Jones*, the question was framed as to whether the carjacking statute “defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.”²²⁷ Justice Souter, writing for the five vote majority, opted for the “three distinct offense” approach.²²⁸ The statutory scheme defines the gravamen of the criminal offense generally, with the respected sections setting forth the specific elements which, if satisfied, determine the degree of the offense and the applicable increasing levels of punishment. Thus, the taking of a motor vehicle by “force and violence or by intimidation” defines the basic offense, punishable by a fine or imprisonment of not more than fifteen years, or both.²²⁹ If the evidence shows the defendant caused “serious bodily injury” in committing the offense, the punishment range is increased to a fine or

224. *Jones v. United States*, 526 U.S. 227, 243–44 (1999).

225. 18 U.S.C. § 2119 (2018).

226. *Jones*, 526 U.S. at 232 (citations omitted) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)).

227. *Id.* at 229.

228. *Id.*

229. 18 U.S.C. § 2119(1).

imprisonment for not more than twenty-five years, or both.²³⁰ And, if death results from the forceful, violent, or intimidating taking of the motor vehicle, the penalty range extends to imposition of a fine or imprisonment “for any number of years up to life,” or both.²³¹ Thus, recognition of aggravation in the commission of the basic offense of carjacking—forcibly taking a motor vehicle—is built-in to the basic statute, with separate provisions reflecting the increasing degrees of injury possible in the commission of the basic offense.

Critical in the majority’s characterization of this hierarchy of injury in determining punishment is that the three different levels of injury inflicted are deemed to constitute elements of the charged offense, or lesser-included offenses within the hierarchy that must be pleaded and proved to the trier of fact beyond a reasonable doubt,²³² rather than the trial judge determining the degree of offense during sentencing. This binds the prosecution to the jury’s assessment of the degree of injury inflicted in the offense, whether proven exclusively through evidence of the victim’s response to the perpetrator’s threat or use of force against him, or through proof that the victim has either suffered serious physical injury, or the worst case scenario, death.

Apprendi, in contrast to *Jones*, did not deal with the extent of injury or degree of force or violence used in assessing the severity of the offense. Nor did it focus on the traditional requirement for proof of criminal intent, manifested in terms of the hierarchy of culpable mental states recognized in the Model Penal Code,²³³ or Code-incorporating state statutory scheme approaches and terminology.²³⁴ Instead, the decision focused on the accused’s motivation in the commission of the offense. Consequently, the

230. *Id.* § 2119(2).

231. *Id.* § 2119(3).

232. See *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (“In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”).

233. See *supra* text accompanying note 222.

234. E.g., ARK. CODE ANN. § 5-2-202 (West 2017). Arkansas adopted the Model Penal Code in 1975. *Preface to Arkansas Code of 1987 Annotated*, ARKANSAS CODE REVISION COMMISSION VOL. B, at iii (1995).

Court announced a new rule of constitutional criminal procedure.²³⁵ In addressing motivations for the offense, the New Jersey statutory scheme authorizes increased punishment applicable to any degree of the generic offense charged, such that an individual committing a simple battery or an aggravated battery could suffer enhanced punishment based on a racially discriminatory motivation.

Other statutory schemes have adopted the general *Apprendi* principle in which proof of a particular fact arising in the commission of the offense warrants greater punishment than the basic offense. Thus, in *United States v. Cotton*,²³⁶ the Court held that where the quantity of illegal drugs may determine the level of punishment, the indictment must include an allegation of the quantity of drugs possessed or used in trafficking as an element of the charge.²³⁷

Apprendi has affected other sentencing schemes, including the Washington Sentencing Reform Act,²³⁸ which permitted the judge to impose a higher sentence than the “standard range” based upon proof of an aggravated circumstance.²³⁹ *Apprendi* required proof of an aggravating circumstance for the imposition of a death sentence in a capital prosecution.²⁴⁰ Additionally, under the previously mandatory federal sentencing guidelines,²⁴¹ the Court held that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”²⁴²

235. In *Jones*, the Court observed that many states address the issue of increased culpability arising in the context of the facts of the generic offense, such as robbery, which is defined as aggravated robbery when the facts would warrant a finding that the perpetrator threatened or inflicted violence or used a deadly weapon in the commission of the robbery. *Jones v. United States*, 526 U.S. 227, 236–37 (1999).

236. *United States v. Cotton*, 535 U.S. 625 (2002).

237. *Id.* at 632.

238. WASH. REV. CODE ANN. § 9.94A.010 (West 2019).

239. *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004).

240. *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002). *Ring* foreshadowed the requirement that death sentences be imposed by juries, rather than judges, unless jury sentencing is waived in schemes permitting waiver.

241. *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

242. *Id.* at 244. The Court applied the same reasoning in *Cunningham v. California*, related to the state’s sentencing scheme permitting treatment of some sentences aggravated, with greater punishment imposed, based on the circumstances of the offender and offense. *See Cunningham v. California*,

Finally, *Apprendi* represented a break with existing precedent in requiring specific pleading of facts or circumstances warranting increased punishment. In *Alleyne v. United States*,²⁴³ the Court unequivocally asserted that these facts or circumstances constitute *elements* of the offense that must be pleaded and proved beyond a reasonable doubt in order to authorize the imposition of the statutorily contemplated increased punishment.²⁴⁴ Because the Court announced a New Rule of constitutional criminal procedure, under *Griffith* it would apply to all non-final or pending cases where the specific pleading of the aggravating circumstance demanded increased punishment,²⁴⁵ and thus, defendants in such cases would enjoy preservation of their claims. But, under *Griffith*'s prospective applicability approach, *Apprendi* did not apply retroactivity to cases finalized prior to the announcement of the New Rule. Nor was *Apprendi* applied retroactively, as Justice Thomas noted in his dissenting opinion in *Harris v. United States*.²⁴⁶

549 U.S. 270, 293 (2007) (“[O]ur decisions from *Apprendi* to *Booker* point to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum. Because the DSL [determinate sentencing law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.”).

243. *Alleyne v. United States*, 570 U.S. 99 (2013).

244. The only exception to the *Alleyne* rule remains proof the defendant has a prior conviction qualifying for enhanced sentence. *Almendarez-Torres v. United States*, 523 U.S. 224, 226–28 (1998). Brent E. Newton has criticized the Court’s inconsistent treatment of felon status:

In *Almendarez-Torres*, over a vigorous dissent, a bare majority of the Court held a criminal defendant’s prior conviction subjecting him to a greatly enhanced prison sentence as a recidivist is not an “element” of the “enhanced” crime charged in a subsequent case. Therefore, the Court concluded, nothing in the Constitution requires a defendant’s prior conviction to be alleged in an indictment or proved to a jury beyond a reasonable doubt—as “elements” of an offense must be—for an enhanced sentence to be imposed. Rather than being an “element,” the Court held a defendant’s prior conviction is a “sentencing factor” that a trial judge may find by a mere preponderance of the evidence. However, in a series of cases beginning in 2000, a total of five members of the Court—including Justice Thomas, who had joined the five-Justice majority in *Almendarez-Torres*—have since stated that it was wrongly decided. Yet, despite countless opportunities to do so since 2000, the Court has not granted certiorari to reconsider *Almendarez-Torres*.

Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 HOU. L. REV. 747, 751–52 (2008).

245. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

246. *Harris v. United States*, 536 U.S. 545, 581 (2002) (Thomas, J., dissenting) (“No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect.”).

In *Harris*, the Court continued to draw a distinction between “sentencing factors” and “elements”²⁴⁷ that provided a basis for imposing increased punishment upon conviction through statutory minimum sentences. Requiring proof of facts limited the authority of the judge to order a lesser punishment within the range, thus warranting increased punishment within the overall statutory range.²⁴⁸ The *Alleyne* Court overruled *Harris*, holding that the attempt to distinguish between the two would be “inconsistent” with *Apprendi*.²⁴⁹

The history of *Apprendi* rests on the Court’s review of the claim that evidentiary facts increase punishment or the range of punishment. Subsequent decisions building upon the *Apprendi* rationale established a cohesive doctrine developing the Sixth Amendment guarantee of notice afforded to the accused; it requires that the charges against the defendant, as well as any allegations that necessarily increase punishment or the range of punishment the defendant faces—or results in the increase of mandatory punishment minimums—be proven beyond a reasonable doubt. None of this could have happened had the Court not granted certiorari to consider the issue initially raised in *Apprendi*,²⁵⁰ because the Court alone retains authority to construe federal constitutional protections.²⁵¹ *Apprendi* and its significant progeny can be traced to counsel’s decision to petition the Court to review the New Jersey Supreme Court’s decision, which denied relief in a split decision.²⁵²

247. See *id.* at 549 (“Yet not all facts affecting the defendant’s punishment are elements.”).

248. *Id.* at 550–51, 567 (construing 18 U.S.C. § 924(c)(1)(A), which imposed a statutory minimum sentence upon offenders brandishing a firearm in the course of committing a crime of violence or drug trafficking crime, with the basic sentence for using or carrying a firearm set at a five year minimum, but that minimum being increased to seven years upon proof that the defendant brandished the firearm).

249. *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (“Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury. Accordingly, *Harris* is overruled.”).

250. See *Apprendi v. New Jersey*, 530 U.S. 466, 474 (2000) (discussing the constitutional component of the lower court’s ruling).

251. E.g., *Arkansas v. Sullivan*, 532 U.S. 769 (2001). In response to the state court’s interpretation of Fourth Amendment privacy protection disregarding the decision on point in *Whren v. United States*, 517 U.S. 806 (1996), the Court summarily and emphatically reversed: “Because the Arkansas Supreme Court’s decision on rehearing is *flatly contrary* to this Court’s controlling precedent, we grant the State’s petition for a writ of certiorari and reverse.” *Sullivan*, 532 U.S. at 771 (emphasis added).

252. *State v. Apprendi*, 731 A.2d 485 (N.J. 1999).

C. *Relief Requires Overruling an Existing Rule or Precedent*

When relief for a client requires a change in federal constitutional law, the route for seeking review of an existing rule, or precedent, lies in petitioning for certiorari in the Supreme Court. Because the Court's authority in the interpretation of constitutional protections is ultimate, the change in existing law does not necessarily have to occur in certiorari in the direct appeal process, but it typically will.²⁵³ While the Court may announce a new rule of constitutional criminal procedure on certiorari review either after conclusion of state post-conviction,²⁵⁴ federal post-conviction,²⁵⁵ or federal habeas corpus process,²⁵⁶ certiorari in the direct appeal process remains the most important option for counsel representing clients whose claims would otherwise be foreclosed by existing rules or precedent. In any event, the Court has explained that any "departure from [the doctrine of stare decisis] demands special justification."²⁵⁷

Clearly, only the Court retains authority to reconsider or overrule its prior decisions in announcing a new rule, as it reminded lower courts in *Bosse v. Oklahoma*.²⁵⁸ "It is this Court's prerogative alone to overrule one of its precedents,"²⁵⁹ consistent with its explanation in *Hohn v. United States*,²⁶⁰ where the Court held, "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."²⁶¹ The Court has cautioned lower courts not to respond to critiques of precedent, suggesting that it has impliedly departed from its prior reasoning

253. 28 U.S.C. § 1254(1) (2018) (authorizing the Court to review decisions rendered by the federal courts of appeals by writ of certiorari in "any civil or criminal case").

254. See, e.g., TEX. CODE CRIM. PROC. ANN. arts. 11.07–11.071 (stating post-conviction remedies for Texas defendants convicted in non-capital and capital cases, respectively).

255. 28 U.S.C. § 2255 (detailing post-conviction relief remedy for defendants convicted in federal criminal trials).

256. *Id.* § 2254.

257. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

258. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016).

259. *Id.* at 2.

260. *Hohn v. United States*, 524 U.S. 236 (1998).

261. *Bosse*, 137 S. Ct. at 2 (quoting *Hohn*, 524 U.S. at 252–53).

in holding that a precedent has been overruled by implication.²⁶²

There are at least three situations in which the Court has overruled precedent to announce new rules of constitutional protections that will apply to federal and state prosecutions in which certiorari has played a key procedural role in the change in the law.

1. Distinguishing Long-Standing Precedent

First, the Court may overrule precedent undisturbed over time by significant challenges to existing rules, as reflected in the recent decision in *Pena-Rodriguez v. Colorado*.²⁶³ There, the majority recognized an exception to the traditional prohibition regarding use of juror testimony as a means of impeaching a conviction,²⁶⁴ when the issue relates to racially biased references interjected in the jury's deliberations.²⁶⁵ Justice Kennedy, relying on precedent reflecting the singular importance attached to combating the effect of racial prejudice historically acknowledged by the Court,²⁶⁶ wrote for the five-member majority:

262. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (admonishing lower courts against "conclud[ing] the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent").

263. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

264. The Court had consistently affirmed the principle that jury verdicts could not be impeached with evidence from individual jurors regarding their deliberations in convicting the accused, or from challenging a civil verdict based upon a juror's misconduct in lying in response to questioning during voir dire. *Warger v. Shauers*, 574 U.S. 40, 52 (2014); *Tanner v. United States*, 483 U.S. 107, 126-27 (1987). In federal trials, evidentiary rules limit the use of juror testimony to impeach the jury's reasoning in reaching a verdict. FED. R. EVID. 606(b). An exception permits the use of juror testimony when the claimed misconduct involves a matter involving introduction of "evidence" or influence from an outside source that is authorized by the court when it conducts the trial. FED. R. EVID. 606(b)(2).

265. *Pena-Rodriguez*, 137 S. Ct. at 867-69.

266. The Court, however, has not always been willing to subordinate substantive complaints concerning racial prejudice tainting criminal prosecutions. In *Buck v. Thaler*, for instance, it denied certiorari seeking review of a claim that the Texas capital defendant's death sentence was tainted by expert testimony—offered by the defense—who expressed his opinion that the prospect for commission of future acts of criminal violence was greater for African-Americans than whites. *Buck v. Thaler*, 565 U.S. 1022 (2011). Justice Alito, joined by Justices Scalia and Breyer, filed a statement respecting the denial of certiorari, explaining that the issue of impermissible racial classification was defaulted because defense counsel had essentially opened the door to this testimony. *Id.* at 1022-25. Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented from the denial of certiorari, arguing that Buck's claim should have been heard on the merits, rather than deemed procedurally defaulted. *Id.* at 1030. Buck's death sentence was later commuted after the Court agreed to review the denial of federal habeas relief based on both substantive and procedural grounds. *Buck v. Davis*, 137 S. Ct. 759, 767 (2017). Significantly, this time the Court found that Buck's trial

[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.²⁶⁷

2. Overruling Recent, Narrowly-Decided Precedent

Second, the Court has shown a willingness to reconsider more recent decisions in light of changing composition²⁶⁸ or rejection of majority reasoning contested in dissenting opinions in the earlier decision. In *Payne v. Tennessee*,²⁶⁹ for example, the Court overruled two then-recent decisions in *Booth v. Maryland*²⁷⁰ and *South Carolina v. Gathers*,²⁷¹ which held that victim-impact statements were not properly admitted at state capital sentencing proceedings. But, as Chief Justice Rehnquist explained, *Booth* and *Gathers* had been decided on 5–4 votes:

counsel rendered ineffective assistance, explaining: “No competent defense attorney would introduce such evidence [expert opinion that African-Americans more likely than whites to commit additional violent crimes in future] about his own client.” *Id.* at 775; Alex Arriaga, *Texas Death Row Inmate Duane Buck has Sentence Reduced to Life After Supreme Court Orders Retrial*, TEX. TRIBUNE (5:00 PM, Oct. 3, 2017), <https://www.texastribune.org/2017/10/03/high-profile-death-row-case-comes-end-guilty-plea/> [<https://perma.cc/BD9T-2VG7>]. For discussion of the complicated history of Buck's case in light of other cases in which the same expert testified as to his opinion that there is a higher probability that Hispanic— and African—American defendants would commit future acts of dangerous criminal violence, see J. Thomas Sullivan, *The Abyss of Racism*, 13 J. APP. PRAC. & PROCESS 92, 110–15 (2012).

267. *Pena-Rodriguez*, 137 S. Ct. at 869.

268. The Court is sensitive to the suggestion that its changing composition will justify change in the law. In concurring in *Alleyne*, Justice Sotomayor, joined by Justices Ginsburg and Kagan, responded to Justice Alito's dissenting opinion in which he attributed the majority's position in overruling precedent as the result of changing composition of the court. *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). Justice Sotomayor wrote:

Justice Alito is therefore mistaken when he suggests that the Court overrules *Harris* because “there are currently five Justices willing to vote to” do so. No doubt, *it would be illegitimate to overrule a precedent simply because the Court's current membership disagrees with it*. But that is not a plausible account of the decision today. The Court overrules *McMillan* and *Harris* because the reasoning of those decisions has been thoroughly undermined by intervening decisions and because no significant reliance interests are at stake that might justify adhering to their result.

Id. at 121 (emphasis added) (citation omitted).

269. *Payne v. Tennessee*, 501 U.S. 808 (1991).

270. *Booth v. Maryland*, 482 U.S. 496 (1987).

271. *South Carolina v. Gathers*, 490 U.S. 805 (1989).

Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions. *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts.²⁷²

The majority thus eschewed deference to the principle of stare decisis, holding that narrow decisions based on reasoning generating significantly diverging views is subject to reversal, particularly when those narrow holdings do not reflect long-standing precedents.²⁷³ The tendency to overrule recent decisions decided narrowly and with strong, sometimes caustic, dissents,²⁷⁴ appears in recent history to have served to restrict procedural rights or limitations afforded to criminal defendants,²⁷⁵ while expanding substantive constitutional protections.²⁷⁶

In some cases, the Court has overruled prior decisions based on what appears to be changing public consensus regarding the wisdom or fairness of criminalization. *Bowers v. Hardwick*,²⁷⁷ upholding criminalization of even consensual sodomy among adults in 1986 with four justices dissenting on due process grounds,²⁷⁸ was overruled in *Lawrence v.*

272. *Payne*, 501 U.S. at 828–30. Justice O'Connor, joined by Justices White and Kennedy, reiterated her opposition in *Booth*. *Id.* at 830, 832 (O'Connor, J., concurring) (citing *Booth v. Maryland*, 482 U.S. 496, 515 (1987) (White, J., dissenting)).

273. *Payne*, 501 U.S. at 828–30.

274. See, e.g., J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 220, 229–30 (2017) (arguing Justice Scalia's caustic barbs may have lost him support for his legal reasoning).

275. The 5–4 decision in *Pena-Rodriguez* may prove to be an obvious candidate for a fairly rapid overruling and retrenchment by the Court in light of the fact that Justice Kennedy wrote the majority opinion and has been replaced by Justice Kavanaugh. Justice Kavanaugh is generally assumed to be more conservative in his views than Justice Kennedy.

276. See *Graham v. Florida*, 560 U.S. 48, 81 (2010) (barring the imposition of a life sentence without the possibility of parole for juvenile offenders convicted of non-homicide offenses); *Kennedy v. Louisiana*, 554 U.S. 407, 445 (2008) (barring capital punishment for the rape of a child even under aggravating circumstances); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (explaining that the Eighth Amendment prohibits the execution of a mentally retarded capital defendant).

277. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

278. *Id.* at 199 (Blackmun, J., dissenting). Justice Powell concurred but explained that he believed the imposition of a sentence of up to twenty years would pose a significant issue of excessive punishment proscribed by the Eighth Amendment, an issue that he noted had not been raised during litigation. *Id.* at 197–98 (Powell, J., concurring).

Texas,²⁷⁹ with the majority citing *Payne* for the proposition: “The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”²⁸⁰

3. Dramatic Rejection of Precedent

Perhaps the most dramatic overruling of long-standing precedent without significant intervening litigation seeking change, is the Court’s 1972 decision in *Furman v. Georgia*,²⁸¹ which effectively struck down all state death penalty statutes a year after the Court had upheld capital sentencing in *McGautha v. California*, and its companion case, *Crampton v. Ohio*.²⁸² The changing positions taken by Justices Stewart²⁸³ and White²⁸⁴ voting in the plurality, whose objections to capital sentencing reflected a view that its infrequent and erratic imposition undermined the credibility of the punishment, led to the plurality determination condemning existing state statutes authorizing use of death sentences. Interestingly, while President Nixon’s four appointments during the intervening period contributed to the changing political composition of the Court, the

279. *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Thomas, blaming the change in the Court’s position on criminalization of homosexual sodomy on the *nation’s law schools*:

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.

Id. at 602 (Scalia, J., dissenting).

Justice Thomas filed a separate dissent in which he argued that the criminalization of homosexual sodomy by the Texas legislature was “silly,” but not unconstitutional. *Id.* at 605–06 (Thomas, J., dissenting).

280. *Id.* at 577 (majority opinion) (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

281. *Furman v. Georgia*, 408 U.S. 238 (1972).

282. *McGautha v. California*, 402 U.S. 183 (1971), *vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972) (remanding to the Supreme Court of Ohio insofar as the imposition of the death penalty was undisturbed, to be disposed of in light of *Furman*).

283. *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

284. *Id.* at 310 (White, J., concurring).

appointments did not save the death penalty at the time with Chief Justice Warren Burger, Justice Harry Blackmun, Justice Lewis Powell, and Justice William Rehnquist, all dissenting in *Furman's* 5–4 plurality decision.²⁸⁵

The dramatic reversal in the Court's position on capital sentencing could have only been accomplished by the Court itself in *Furman*, demonstrating the need to use the certiorari process even in light of the most recent adverse precedent that would appear to foreclose immediate further review. But, the Court's decision to reconsider the structure of the capital sentencing process in light of Eighth and Fourteenth Amendment considerations in *Furman* created a substantial body of jurisprudence that still marks the Court's caseload in virtually every term.

And, apart from the reversal of its position on capital sentencing, perhaps the most emphatic example of the Court *rejecting* reasoning supporting a prior decision lies in the majority opinion in *Crawford v. Washington*.²⁸⁶ There, Justice Scalia, reflecting his adherence to the historical significance of the roots²⁸⁷ of the Sixth Amendment Confrontation Clause,²⁸⁸ wrote: “[W]e view this as one of those *rare* cases in which the result below is so improbable that it reveals a *fundamental failure on our part* to interpret the Constitution in a way that secures its intended constraint on judicial discretion.”²⁸⁹

The *Crawford* decision reset the Sixth Amendment Confrontation Clause protection to restore the right of the accused to test the credibility of the witnesses against him through cross-examination, typically conducted before the fact-finder at trial.²⁹⁰

285. Chief Justice Burger dissented, joined by Justices Blackmun, Powell and Rehnquist. *Id.* at 375 (Burger, C.J., dissenting). The other three dissenting Justices each wrote separate opinions. *Id.* at 406 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

286. *Crawford v. Washington*, 541 U.S. 36 (2004).

287. Justice Scalia's opinion for the majority includes extensive historical analysis of confrontation, focusing on English common law traditions—particularly with respect to the significance of the absence of cross-examination raised as an issue in the trial of Sir Walter Raleigh—and early American precedents. *Id.* at 43–57.

288. The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. CONST., amend. VI.

289. *Crawford*, 541 U.S. at 67.

290. Confrontation typically demands that the witness be cross-examined in the presence of the jury. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

The Sixth Amendment confrontation right was first made expressly applicable in the context of state prosecutions in *Pointer v. Texas*.²⁹¹ *Pointer* involved the question of admission of sworn, prior testimony given during a preliminary hearing at which time the accused presumably had an opportunity to cross-examine the witness. The *Pointer* Court rested its holding on the existence of “an adequate opportunity” for cross-examination.²⁹² But, without assistance of counsel, *Pointer* did not have that opportunity and, thus, the admission of the witness’s prior testimony at trial was contrary to the Sixth Amendment confrontation guarantee. Consequently, the Court grounded its confrontation analysis in the existence of a meaningful opportunity for cross-examination for the accused at some point in the criminal proceedings.

On the same day, the Court held the Confrontation Clause applied to the state proceedings in *Pointer*.²⁹³ The Court also considered the nature of confrontation in *Douglas v. Alabama*.²⁹⁴ The constitutional preference for cross-examination was unequivocally demonstrated in *Douglas* when the Court rejected the prosecutor’s use of an accomplice’s statement as a basis for cross-examining the declarant, who had refused to testify at trial.²⁹⁵ The prosecutor had simply read the statement before the jury, over defense counsel’s objection, asking the uncooperative witness to affirm each portion of its contents.²⁹⁶ The prosecutor then called three law enforcement officers to testify that the statement was, in fact, made by the accomplice,

291. *Pointer v. Texas*, 380 U.S. 400 (1965).

292. *Id.* at 406–08. Subsequent decisions emphasized the meaningful opportunity for cross-examination in the evaluation of admissibility of prior testimony. See *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972) (“Before it can be said that Stubbs’ constitutional right to confront witnesses was not infringed, however, the *adequacy* of [the victim’s] examination at the first trial must be taken into consideration.”) (emphasis added); see also *California v. Green*, 399 U.S. 149, 165–68 (1970) (holding the preliminary hearing testimony admissible at trial, regardless if the witness was made unavailable, because the respondent had an opportunity for cross-examination).

293. *Pointer*, 380 U.S. at 407.

294. *Douglas v. Alabama*, 380 U.S. 415 (1965).

295. *Id.* at 416–17.

296. The Court had long recognized, however, that under certain circumstances, the confrontation right did not necessarily depend upon the opportunity for cross-examination of a witness who was not available to testify at trial. For instance, in *Mattox v. United States*, the Court recognized the common law rule admitting dying declarations as an exception to the usual requirement for cross-examination based upon their presumed inherent reliability, being made under perception of impending death. *Mattox v. United States*, 146 U.S. 140, 151 (1892).

but the statement itself was never offered, nor admitted into evidence.²⁹⁷ Thus, the prosecutor succeeded in using the statement without the defense being afforded any meaningful opportunity to cross-examine the accomplice as to the accuracy of the confession or his credibility.²⁹⁸

Douglas expressed the Court's uncompromising view of the constitutional significance of cross-examination as essential to the confrontation guarantee²⁹⁹ until the Court's decision in *Ohio v. Roberts*,³⁰⁰ issued fifteen years after *Douglas*. The Court's abrupt shift from recognition of cross-examination as the heart of confrontation served to accommodate common law evidence concepts within the Sixth Amendment guarantee. In *Roberts*, the majority effectively integrated confrontation and principles underlying the traditional prohibition against admission of hearsay, and more importantly, its many exceptions. In doing so, the majority introduced a confrontation doctrine in which the actual process of confrontation through cross-examination was itself subject to exception when, in the Court's view, cross-examination seems unlikely to afford significant benefit in searching for truth.³⁰¹

The factual context of *Roberts* suggests that the majority unnecessarily departed from established principles guiding construction of the confrontation guarantee in fashioning the new doctrine ultimately repudiated in *Crawford*. In *Roberts*, the witness testified at the preliminary hearing, was subjected to cross-examination, and was shown to be unavailable to testify at trial despite the prosecution's diligent efforts to procure her attendance.³⁰²

Consistent with the Court's traditional holdings, the Court could have simply reaffirmed the principle that previously cross-examined testimony is generally admissible when the prosecution cannot reasonably secure the

297. *Douglas*, 380 U.S. at 417.

298. *Id.* at 419–20.

299. The *Douglas* Court found that “a primary interest secured by [the Confrontation Clause] is the right of cross-examination.” *Id.* at 418.

300. *Ohio v. Roberts*, 448 U.S. 56 (1980).

301. The *Roberts* Court explained the relationship between the operation of the hearsay rule and its exceptions and the Sixth Amendment Confrontation Clause: “Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’” *Id.* at 65.

302. *Id.* at 58–59.

attendance of the witness for trial.³⁰³ Instead, the *Roberts* Court held that cross-examination before the jury is not required if a statement bears sufficient indicia of reliability to warrant its admission. Justice Blackmun, writing for the majority, concluded:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.” Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.³⁰⁴

Thus, the reliability requirement, according to *Roberts*, is met when the statement falls within a “firmly rooted hearsay exception” traditionally recognized as justifying admission or the statement has “particularized guarantees of trustworthiness.”³⁰⁵ This approach effectively opened the door to admission of hearsay without the accused being afforded an opportunity to engage in meaningful cross-examination to test the declarant’s credibility, or conclusions, once the trial court has determined that absence of cross-examination would not compromise the fact-finding process.

Two decisions issued after *Roberts*, however, undermined its apparent breadth. In *Lee v. Illinois*,³⁰⁶ the majority applied the *Roberts* confrontation formulation³⁰⁷ in a case involving inculpatory confessions made by co-defendants that arguably “interlocked,” thereby arguably establishing the reliability of the non-testifying co-defendant’s admission against Lee at

303. For example, the Court recognized that the prior testimony of a deceased witness is admissible in *Mattox*, despite the potential lost benefit to the accused of not being able to cross-examine the witness before the jury. The *Mattox* Court noted that despite the accepted value of cross-examination in this context “general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.” *Mattox*, 156 U.S. at 243.

304. *Ohio*, 448 U.S. at 66.

305. *Id.*

306. *Lee v. Illinois*, 476 U.S. 530 (1986).

307. *Id.* at 543–44.

trial.³⁰⁸ The majority found that the statement did not demonstrate sufficient particular guarantees of trustworthiness to warrant admission in light of the traditional suspicion with which accomplice statements are viewed³⁰⁹ because of the incentives affecting the credibility of accomplices, who may minimize their own culpability by shifting blame to others.³¹⁰ However, the majority did not repudiate the rationale of *Roberts*, which supplanted the requirement for cross-examination for co-defendant confessions inculcating the accused in *Douglas*.³¹¹ Instead, it accepted the validity of the *Roberts* test, while holding that the accomplice's statement in *Lee* failed to meet the *Roberts* standard for admission without cross-examination.

Later, in *Lilly v. Virginia*,³¹² the Court issued another decision suggesting a limitation on the prosecution's reliance on the *Roberts* rule for admission without cross-examination. The prosecution offered the statement of an accomplice, the defendant's brother, inculcating the defendant in the commission of the murder. When called to testify at trial, the brother asserted his Fifth Amendment privilege and refused to testify. The prosecution then offered the statement as a declaration against his penal interest and, thus presumably reliable and admissible without affording the defense any meaningful opportunity for cross-examination. The defendant

308. *Id.* at 543 ("Illinois contends that Thomas's statement bears sufficient 'indicia of reliability to rebut the presumption of unreliability that attaches to codefendants' confessions, citing as support our decision in *Ohio v. Roberts*. While we agree that the presumption may be rebutted, we are not persuaded that it has been in this case.").

309. *Id.* at 541 ("Over the years since *Douglas*, the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.").

310. The *Lee* majority observed:

[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.

See id. (quoting *Bruton v. United States*, 391 U.S. 123, 141 (1968) (White, J., dissenting)).

311. The *Lee* majority described the holding in *Douglas*:

This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Id. at 541.

312. *Lilly v. Virginia*, 527 U.S. 116 (1999).

was convicted of multiple charges, including capital murder, and sentenced to death.³¹³

The state court affirmed, holding that the declaration against penal interest exception to admission of hearsay based on unavailability of the declarant was “a firmly rooted exception to the hearsay rule” under Virginian law.³¹⁴ In a fragmented decision reflecting multiple views of the Court, the Justices all agreed that the penal interest exception did not provide a sufficient basis for admission for purposes of analysis of the Sixth Amendment’s confrontation protection:

We assume, as we must, that Mark’s statements were against his penal interest as a matter of state law, but the question whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law.³¹⁵

The finding that the declaration against the penal interest exception—excluding admission of hearsay at the criminal trial—possibly foreshadowed the Court’s changing views regarding the wisdom of the departure from cross-examination initially taken in *Ohio v. Roberts*.³¹⁶

From *Douglas* through *Lee* and *Lilly* to *Crawford*, the critical issue in the admission of jointly inculpatory statements made by a declarant unavailable for cross-examination at trial lies in the incentive for the declarant—whether co-defendant or accomplice—to use their inculpatory statement to minimize their own culpability, thereby implicating the accused as the more culpable participant in the offense. Accomplice statements are considered

313. See *id.* at 121–22 (providing the assailant’s charges, such as the murder of DeFilippis and that the witness used his Fifth Amendment right).

314. *Lilly v. Commonwealth*, 499 S.E.2d 522, 534 (Va. 1998).

315. *Lilly*, 527 U.S. at 125.

316. See, for instance, *Crawford v. Washington*, where the majority observed:

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality’s speculation in *Lilly*, that it was “highly unlikely” that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them.

Crawford v. Washington, 541 U.S. 36, 63–64 (2004)

inherently suspect due to the accomplice's self-interest,³¹⁷ "which may be promoted by cooperating with authorities or, more aggressively, by supplying information sought by authorities that may not be truthful."³¹⁸ Even if the non-testifying declarant is not motivated by self-interest based on culpability, and the out-of-court statement is not tainted for that reason, if the statement was given in anticipation of its use as testimony, lack of cross-examination may result in the accused's inability to demonstrate inaccuracy in allegations or assertions of the accused's culpability.³¹⁹

Thus, the Sixth Amendment promise of confrontation resurfaced in *Crawford* where the Court was asked to reconsider the approach taken in *Roberts*, again in the context of admitting an accomplice's statement inculcating the accused without affording him the opportunity for cross-examination.³²⁰ Michael Crawford was charged with the murder of an individual whom he apparently believed had attempted to rape his wife,

317. See, e.g., *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting) (concluding such statements "have traditionally been viewed with special suspicion").

318. J. Thomas Sullivan, Crawford, *Retroactivity, and the Importance of Being Earnest*, 92 MARQ. L. REV. 231, 244, 244 n.82 (2008) ("A particularly poignant story reflecting the self-interest of a suspect implicating another individual involves the confession by Christopher Ochoa, who admitted to a rape and murder he did not commit, and his implication of a friend, Richard Danziger, in the same crime. Ochoa was motivated by fear of the death penalty. Some twelve years after both men were convicted and sentenced to life terms, they were exonerated by the confession of another individual whose responsibility was corroborated by DNA evidence. Ochoa testified against Danziger at trial, later admitting that he lied under oath in order to obtain the life sentence promised in return for his own plea of guilty. Both men were ultimately released on the basis of the true killer's confession made in a letter to the Travis County, Texas, district attorney and the recovery of DNA evidence demonstrating that this confession was accurate. Ochoa completed his education, including graduating from the University of Wisconsin School of Law, the institution whose Innocence Project had championed the case, and now practices criminal law. Danziger, however, was assaulted in prison, suffering a severe brain injury that has left him permanently impaired and living with assistance paid for from the settlement of his civil suit against the City of Austin and Travis County." (internal citations omitted) (citing Diane Jennings, *A Shaken System*, DALLAS MORNING NEWS, IA (Feb. 24, 2008))).

319. For example, the affidavit given to police investigating a domestic violence call by the victim would be testimonial in nature and inadmissible without the opportunity for cross-examination of the declarant at trial, despite that they were not made by an accomplice with motivation to implicate the accused. See *Hammon v. State*, 853 N.E.2d 477, 478 (Ind. 2006) (providing established rules on testimonials and their nature in criminal cases). In the companion case, *Davis v. Washington*, however, the emergency 911 call reporting a domestic assault was not deemed "testimonial," precisely because it was not made for the equivalent purpose of giving testimony in a legal proceeding. *Davis v. Washington*, 547 U.S. 813, 817, 828 ("She simply was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial." (quoting *United States v. Inadi*, 475 U.S. 387 (1986))).

320. *Id.* at 40.

Sylvia. Without affording Michael any opportunity to cross-examine Sylvia, who did not testify at trial, Sylvia's recorded statement was admitted into evidence, and the state supreme court upheld its admission, finding that it bore the requisite indicia of reliability to warrant admission without cross-examination.³²¹

On certiorari, the Court reversed, finding that admitting Sylvia's statement to police without affording Michael the opportunity to cross-examine her at trial, violated his Sixth Amendment right to confrontation.³²² In the process, the majority expressly rejected the alternative theory for satisfaction of the confrontation guarantee adopted by the *Roberts* majority. Justice Scalia, writing for the majority, eloquently noted: "*Roberts*' failings were on full display in the proceedings below."³²³ He explained:

Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts*' unpredictable and inconsistent application.³²⁴

Justice Scalia provided a masterful argument in defense of cross-examination as the heart of the confrontation guarantee, tracing the

321. See *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002) (en banc) (noting that the trial court admitted the taped hearsay statements that defendant's spouse made to police officers). The state court relied on the "interlocking" nature of statements taken from Michael and Sylvia Crawford, relying on *Lee v. Illinois*, and concluding: "Because Sylvia's and Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause." *Crawford*, 54 P.3d at 664.

322. *Crawford*, 541 U.S. at 69.

323. *Id.* at 65.

324. *Id.* at 65–66.

history of the right to confrontation to Roman times,³²⁵ focusing on the trial of Sir Walter Raleigh, who was convicted on the basis of an uncrossed allegation of treason made by his purported accomplice, Lord Cobham.³²⁶ He continued his historical analysis through development of English law,³²⁷ American colonial law, and the practices of the states in requiring cross-examination as a predicate for admission of testimony.³²⁸

In focusing on the rationale for expanding admission of testimony not subjected to cross-examination adopted by the *Roberts* majority, adopting “reliability” of the statement as the touchstone for admissibility³²⁹—recognizing either the historical basis for admission of the hearsay as an exception to the rule rooted in the common law or tested by determining whether the statement bore sufficient indicia of reliability, reflecting particularized guarantees of trustworthiness—Justice Scalia argued:

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.³³⁰

325. See *id.* at 43 (“The right to confront one’s accusers is a concept that dates back to Roman times.”).

326. Raleigh’s Case, 2 How. St. Tr. 1 (1603).

327. See *Cranford*, 541 U.S. at 44 (noting that after Raleigh’s conviction, “[t]hrough a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused ‘face to face’ at his arraignment”).

328. See *id.* at 45–50 (“Several authorities also stated that a suspect’s confession could be admitted only against himself, and not against others he implicated.”).

329. Chief Justice Rehnquist, joined by Justice O’Connor, concurred only in the judgment. *Id.* at 69 (Rehnquist, C.J., concurring). He disagreed with the majority’s rejection of the *Roberts* rationale, arguing:

I dissent from the Court’s decision to overrule *Ohio v. Roberts*. I believe that the Court’s adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

Id. Chief Justice Rehnquist had previously argued that *Lee* overruled *Douglas* based on *Lee*’s adoption of the rationale of *Roberts*, in his concurring opinion to the Court’s remand in *New Mexico v. Earnest*, in which the majority vacated the reversal of Earnest’s murder conviction and remanded for reconsideration in light of *Lee*. *New Mexico v. Earnest*, 477 U.S. 648, 649–50 (1986) (Rehnquist, J., concurring) (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

330. *Cranford*, 541 U.S. at 62 (majority opinion).

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.³³¹

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.³³²

Justice Scalia's direct assault on *Roberts* in *Cranford* was eloquently phrased in his conclusion: "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."³³³

Clearly, the decision in *Cranford* was grounded in the successful petition for certiorari that opened the door for Justice Scalia and the *Cranford* majority to bar admission of testamentary hearing at trial when the accused has not been afforded a meaningful opportunity to cross-examine the declarant and test the credibility of assertions inculcating the defendant, even when the testimony arguably is against the declarant's penal interest.

D. *Relief Requires a New Rule Applied to a Fourth Amendment Claim Not Subject to Review in Federal Habeas Corpus Following Stone v. Powell*

For state defendants whose convictions rest on evidence seized as a result of a search that has been challenged and found lawful in the pre-trial process, certiorari affords the only realistic remedy for relief. In *Stone v. Powell*,³³⁴ the Supreme Court effectively barred review of Fourth Amendment-based claims of illegal search and seizure of evidence that had been litigated in state court proceedings without success.³³⁵ Justice Powell, writing for the majority, concluded:

In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be

331. *Id.* at 59.

332. *Id.*

333. *Id.* at 63.

334. *Stone v. Powell*, 428 U.S. 465 (1976).

335. *Id.* at 494.

granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.³³⁶

Consequently, the Court established itself as the only option for obtaining relief on a search and seizure claim, regardless of whether that claim relies on recognition of a new rule of criminal procedure arising from Fourth Amendment protection that would require exclusion of the seized evidence. Even when the defendant's claim that the state court failed to exclude evidence that should have been excluded under existing Supreme Court precedent is meritorious, the federal habeas corpus process offers no potential for relief except in the extremely rare situation in which the state courts have failed to engage in fair adjudication of the defendant's suppression motion.

The rationale underlying *Stone v. Powell* is not difficult; the function of federal habeas corpus is to address the problem of imprisonment resulting from proceedings in which the conviction or sentence has been obtained in violation of a federal constitutional right.³³⁷ But infractions relating to illegal seizure of physical evidence differ from other constitutional violations because "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."³³⁸ And because the suppression of evidence is the remedy for the illegal seizure of physical evidence—thus preventing the prosecution from using the evidence against the accused at trial³³⁹—the exclusion of the

336. *Id.*

337. The Court framed the issue in terms of the distinction to be drawn between review on direct appeal and in the federal habeas process:

We turn now to the specific question presented by these cases. Respondents allege violations of Fourth Amendment rights guaranteed them through the Fourteenth Amendment. The question is whether state prisoners who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.

Id. at 489.

338. *Id.* at 490.

339. See *Mapp v. Ohio*, 367 U.S. 643, 658 (1961) ("Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approach"). In *Stone v. Powell*, the Court explained that *Mapp* had applied the exclusionary rule to illegally seized evidence to state prosecutions to further the goal of deterring police illegality. It went on to explain:

suppressed evidence enhances the prospect that the criminal judge must either be dismissed for lack of admissible evidence or that the prosecution's case will be compromised if tried.³⁴⁰

In contrast to the fundamental purpose of federal habeas corpus, which addresses the problem of unjust incarceration, certiorari is primarily devoted to the development of federal constitutional interpretation,³⁴¹ including the process of ensuring that lower courts do not engage in decision-making undermining a consistent application of federal constitutional protections.³⁴² In *Michigan v. Long*, the majority observed over thirty years ago:

The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. *The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of "federal law" in the process.* It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States.³⁴³

The *Long* Court adopted a presumption that decisions rendered on claims

The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any "[r]eparation comes too late." Instead, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"

Stone, 428 U.S. at 485–86.

340. See *supra* text accompanying note 329.

341. See *supra* Sections V.A–C.

342. See *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) ("[A] State . . . may not impose such greater restrictions as a matter of federal constitutional law when the United States Supreme Court specifically refrains from imposing them."); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (reversing the judgment of the Supreme Court of Kentucky, thereby indicating that lower court's may not have the power to act where higher courts have purposefully avoided in order to establish protections).

343. *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (emphasis added) (citation omitted).

concerning state courts' interpretation or application of federal constitutional law were within the Court's jurisdiction on certiorari; allowing the Court to review such claims encourages uniformity in the application of federal constitutional protections in state criminal proceedings.³⁴⁴

Stone v. Powell furthers the Court's goal of ensuring a relatively uniform application of Supreme Court precedent in defining Fourth Amendment protections while reserving the authority to determine when those protections should be reconsidered.³⁴⁵ What is not true, however, is the suggestion that the Court has refused to engage in further discussion of privacy issues, or declined to expand Fourth Amendment protections, even though the Court's docket is relatively limited due to the small number of cases in which certiorari is granted each year.³⁴⁶

A brief review of the Court's decisions in Fourth Amendment cases illustrates the point that, while certiorari affords the only basis for arguing for expansion of privacy protection, the virtual elimination of these claims in the federal habeas process has not foreclosed development of the Court's jurisprudence in this area. For instance, in 1980, the Court decided *Payton v. New York*,³⁴⁷ determining that law enforcement officers may only enter a suspect's residence to effect an arrest upon the issuance of a warrant, thereby upholding the expectation of privacy in the home.³⁴⁸ More recently, in the 2018 case of *Collins v. Virginia*,³⁴⁹ the Court reversed a state court ruling and held that the automobile exception does not permit warrantless entry by officers into a home or its curtilage for the purposes of searching a vehicle located on the property.³⁵⁰ The search involved a motorcycle partially parked beneath an overhang of the home's roof, which the Court determined was within the home's curtilage.³⁵¹

344. *Id.* at 1042; *see supra* text accompanying note 199.

345. *Stone v. Powell*, 428 U.S. 465, 480–82 (1976) (concluding the nature and purpose of the Fourth Amendment's exclusionary rule “does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial”).

346. *See supra* text accompanying note 12.

347. *Payton v. New York*, 445 U.S. 573 (1980).

348. *Id.* at 602–03.

349. *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

350. *See id.* at 1670 (“When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant.”) (citation omitted).

351. *See id.* at 1668 (“Upon further investigation, the officers learned that the motorcycle likely was stolen and in the possession of petitioner Ryan Collins.”).

The development of Fourth Amendment protections concerning the home has also been marked in recent years by decisions rendered in the certiorari process when initiated by the state, as in *Georgia v. Randolph*.³⁵² There, the Court held that an occupant's refusal to consent to a search of a shared residence precluded a warrantless search even when another occupant with standing has consented to the search.³⁵³ The petitioner in *Fernandez v. California*³⁵⁴ sought to extend the *Randolph* rationale following his conviction, which was based on evidence seized after a present occupant of the residence consented to the search, while the petitioner was not present and did not object until after the search; the Court rejected the argument offered by the non-consenting, non-present occupant.³⁵⁵ The *Fernandez* decision demonstrated the very narrow factual circumstances underlying *Randolph*, with the majority explaining that police investigating a violent crime encountered a woman and her child at a nearby residence who displayed evidence of an assault.³⁵⁶ When Fernandez appeared at the front door and told officers they had no basis to enter the home, they arrested him for assault and placed him in a patrol car.³⁵⁷ The woman identified Fernandez as her assailant and consented to the officer's search of the residence.³⁵⁸

In decisions addressing the scope of Fourth Amendment protection of an individual's *home*,³⁵⁹ certiorari affords litigants, whether the

352. *Georgia v. Randolph*, 547 U.S. 103 (2006), *aff'g* *State v. Randolph*, 604 S.E.2d 835 (Ga. 2004).

353. *Id.* at 115–16. The majority distinguished the case from *United States v. Matlock*, where the objection of one occupant was not made contemporaneously with the search but was only raised after the seizure leading to the defendant's arrest. *Id.* at 111–12.

354. *Fernandez v. California*, 571 U.S. 292 (2014).

355. *Id.* at 294.

356. *Id.* at 295.

357. *Id.* at 296.

358. *See id.* at 296 (“Lopez identified petitioner as his initial attacker, and petitioner was taken to the police station for booking.”). The search produced evidence of the petitioner's involvement in an armed robbery and multiple weapons, resulting in him being charged with felon in possession, as well as the assault charges. *See id.* at 296–97 (listing the items that were recovered by the officers).

359. Generally, police may not enter a *home* to search without a warrant. *See Brigham City v. Stuart*, 547 U.S. 398, 400 (2006) (“Searches and seizures inside a home without a warrant are presumptively unreasonable for Fourth Amendment purposes.” (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004))). In *Brigham City*, the Court held that entry without a warrant was permissible when officers “have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.” *Id.*

state³⁶⁰ or the accused, the process for advancing claims for expansion or restriction of privacy interests recognized for individuals under the Constitution. In *Kyllo v. United States*,³⁶¹ the Court extended protection of the home to advanced technological search practices when thermal imaging was used to measure heat production inside the home, thereby permitting detection of marijuana cultivation from outside the home.³⁶² The majority observed: “The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much.”³⁶³

Justice Scalia, writing for the majority, succinctly characterized the impact of technological development on the necessity of dealing with traditional notions of Fourth Amendment protection of the home:

On the other hand, the antecedent question whether or not a Fourth Amendment “search” has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.

....

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.³⁶⁴

360. For instance, in *California v. Greenwood*, the Court refused to find that the defendant had a legitimate expectation of privacy in his garbage that had been removed from his home, explaining:

It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public. An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable.

California v. Greenwood, 486 U.S. 35, 39–40 (1988); *see also, e.g., California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (holding no privacy interest precluded seizure of evidence observed from an airplane flying over 1,000 feet above defendant’s property).

361. *Kyllo v. United States*, 533 U.S. 27 (2001).

362. *Id.* at 29–30, 40.

363. *Id.* at 33.

364. *Id.* at 31–34.

Kyllo thus not only resulted in a line being drawn regarding authority of police to observe, then search, but also did so in terms of emerging technology. Emerging technology will continue to influence Fourth Amendment interpretation, as other recent decisions demonstrate, reflecting the significance of *Stone v. Powell* in making certiorari a necessary option for criminal defendants whose prospects for relief depend on the Court's singular authority for interpretation of the constitutional protection.

Thus, in *Riley v. California*,³⁶⁵ a near-unanimous Court³⁶⁶ confronted the need for a novel interpretation of the Fourth Amendment required by the cellular phone³⁶⁷—the most significant source for interpersonal communication, as the Court observed:

These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from *Riley* was unheard of ten years ago; a significant majority of American adults now own such phones.³⁶⁸

The Court thus held that police generally may not lawfully search the informational contents contained on a cell phone without a warrant, even if the accused in possession of the phone has been properly placed under arrest.³⁶⁹

In *Carpenter v. United States*,³⁷⁰ the Court, in a more fragmented decision, extended the underlying principle of privacy relating to cell phone usage to data collected and held by service providers tracking the location of phones

365. *Riley v. California*, 573 U.S. 373 (2014).

366. *Id.* at 377. Chief Justice Roberts wrote the opinion for the Court, with Justice Alito concurring in part, and concurring in the judgment. *Id.* at 403 (Alito, J., concurring).

367. *Id.* at 378 (majority opinion). Chief Justice Roberts phrased the issue as: “whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.”

368. *Id.* at 385. Significantly, of course, the Court's history of interpreting Fourth Amendment privacy protections was closely tied to the technological innovation of its time, such as in *Katz v. United States*, which held that *electronic* surveillance constitutes a search. *Katz v. United States*, 389 U.S. 347, 353–59 (1967).

369. *Riley*, 573 U.S. at 403 (“Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”).

370. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

and, inadvertently, the very individuals using those phones—known as “cell-site location information (CLSI).”³⁷¹ The government relied on information obtained from cell-phone service providers to corroborate evidence of the involvement of individuals in a series of armed robberies of electronics stores, coupled with a cooperating accomplice identifying Carpenter as the leader.³⁷² Carpenter challenged the government’s use of data obtained without issuance of a search warrant supported by probable cause; however, the data was admitted and established the location of his cell phone during the robberies.³⁷³

In *Carpenter*, Chief Justice Roberts, writing for the majority that included the liberal members of the Court, again reminded readers how the Fourth Amendment protection of privacy has evolved: “For much of our history, Fourth Amendment search doctrine was ‘tied to common-law trespass’ and focused on whether ‘the government obtains information by physically intruding on a constitutionally protected area.’”³⁷⁴

Although the data sought by the government was collected by private, non-governmental entities, the *Carpenter* majority held that factor did not deprive the individual of his interest in personal privacy subject to the warrant requirement.³⁷⁵ The majority concluded:

Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter’s wireless carriers was the product of a search.³⁷⁶

Carpenter, *Riley*, and *Kyllo* are examples of the exclusive importance of certiorari in the development of Fourth Amendment doctrine addressing the intersection of traditional privacy expectations and technological innovation dramatically altering daily life. With the factual scenarios underlying these decisions, which could not have been contemplated by the Framers or those ratifying the Constitution and its Fourth Amendment,

371. *Id.* at 2211–12, 2217.

372. *Id.* at 2212.

373. *Id.* at 2212–13.

374. *Id.* at 2213 (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)).

375. *Id.* at 2217.

376. *Id.*

certiorari also affords criminal defendants the only route to challenge less technologically-profound searches, such as forced withdrawal of blood from a driver suspected of driving while intoxicated. The question of forced withdrawal of blood without a warrant was addressed in *Schmerber v. California*.³⁷⁷ There, the Court upheld the seizure of the suspect's blood where delay in obtaining a warrant could reasonably have resulted in destruction of evidence.³⁷⁸

Subsequently, the Court addressed the underlying rationale for withdrawal of blood or other bodily substances without consent. In *Missouri v. McNeely*,³⁷⁹ the state supreme court upheld the suppression of blood alcohol evidence.³⁸⁰ In reaching this conclusion, the court considered the then-existing disagreement among jurisdictions concerning whether dissipation alone meets the exigency requirement, and rejected the position that it did.³⁸¹ The Supreme Court upheld the Missouri court on appeal, requiring consideration of the circumstances supporting the seizure without a warrant on a case-by-case basis.³⁸² “We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.”³⁸³

In *Birchfield v. North Dakota*,³⁸⁴ the Court addressed two important unresolved issues implicated by *McNeely*. First, the majority differentiated between breath and blood tests used to determine alcohol intoxication in terms of the level of intrusion required for testing and the effect on the individual's privacy interests.³⁸⁵ It concluded that because the intrusion inherent in breath testing is relatively slight, and breath tests are valuable for

377. *Schmerber v. California*, 384 U.S. 757 (1966).

378. *Id.* at 770–71.

379. *Missouri v. McNeely*, 569 U.S. 141 (2013).

380. *State v. McNeely*, 358 S.W.3d 65, 75 (Mo. 2012). The state court framed the issue: “The issue before this Court is whether the natural dissipation of blood-alcohol evidence is alone a sufficient exigency to dispense with the warrant requirement under the Fourth Amendment.” *Id.* at 68.

381. *Id.* at 73 (“Wisconsin, Oregon, and Minnesota have adopted the rationale that the rapid dissipation of alcohol alone constitutes a sufficient exigency to draw blood without a warrant.”). These state court decisions were overruled by implication by the Court's decision in *McNeely*. *Missouri*, 569 U.S. at 165.

382. *McNeely*, 569 U.S. at 158.

383. *Id.* at 165.

384. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), *rev'g* 858 N.W.2d 302 (N.D. 2015).

385. *Id.* at 2184–85.

enforcing the law prohibiting intoxicated driving, warrantless testing is permitted under the Fourth Amendment.³⁸⁶ However, with respect to the far greater intrusion involved in obtaining blood samples, Justice Alito, writing for the majority, explained:

We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.³⁸⁷

The majority then concluded that the State's reliance on the exception to the warrant requirement under the Fourth Amendment based on searches conducted *incident to arrest* could not save the seizure of the Petitioner's blood. It held:

Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. And North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.³⁸⁸

The Court then addressed a factually different problem arising in the context of blood alcohol testing, providing evidentiary support for driving while intoxicated or driving under the influence prosecutions in *Mitchell v. Wisconsin*.³⁸⁹ At the conclusion of its 2018 Term, a plurality, again led by Justice Alito, concluded that the unconscious state of the suspected

386. See *id.* at 2184 (“Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.”).

387. *Id.* at 2184.

388. *Id.* at 2186 (citation omitted).

389. *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

driver provided the additional case-specific factor supporting blood seizure without a warrant.³⁹⁰ Justice Thomas concurred in the judgment while arguing *McNeely* was wrongly decided.³⁹¹

The development of blood seizure law is the product of the certiorari process. The questions left open in *Schmerber* have allowed the Court to refine its analysis in light of generally-applied Fourth Amendment doctrine.³⁹² These questions could not otherwise have been answered in the federal habeas corpus process. Moreover, certiorari was the only remedy available to Missouri to challenge its supreme court's interpretation of Fourth Amendment protections, permitting the argument for reversal based on an overly-expansive view of privacy protections made by a state court. This was cognizable in light of *Long*'s reservation of final authority for interpretation of federal constitutional provisions by the Court itself.³⁹³ As such, after *Stone*, certiorari remains the only procedural vehicle for protecting the autonomy of the individual when state courts reject claims urged by criminal defendants in state proceedings. For defendants and their counsel, it is the process that must be considered in seeking expansion of Fourth Amendment protections.

E. *Relief Requires an Expansion of Existing Precedent in the Post-Conviction Process*

Finally, a fifth circumstance in which writ of certiorari addressed to the Supreme Court is critical arises when a new rule or new interpretation or application of precedent is required in order to obtain reversal of an adverse ruling in post-conviction proceedings. Certiorari provides the only route to remedy federal constitutional error that has been raised only in collateral

390. *Id.* at 2539.

391. *See id.* at 2541 (Thomas, J., concurring) (arguing the lack of a per se rule in *McNeely* ignored that "a certain, dispositive fact is always present in some categories of cases."). Justice Gorsuch dissented, complaining that the Court should not have taken the case at all because the issue addressed was not argued in the court below. *Id.* at 2551 (Gorsuch, J., dissenting). Justice Sotomayor, joined by Justices Ginsberg and Kagan, also dissented, asserting that the Fourth Amendment protections required securing a warrant whenever possible, and when not possible, police must justify their warrantless search under a heavy burden of urgent need. *See id.* at 2550–51 (Sotomayor, J., dissenting).

392. *See Schmerber v. California*, 384 U.S. 757, 772 (1966) ("We thus conclude that the present record shows no violation of petitioner's Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present case.").

393. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

proceedings following the conclusion of the direct appeal.³⁹⁴ These claims typically involve challenges to the effectiveness of counsel's representation at trial or on direct appeal.³⁹⁵ They may also include claims arising or disclosed only after the trial or time for filing for new trial, such as failure of the prosecution to disclose evidence favorable to the defendant,³⁹⁶ jury misconduct during trial,³⁹⁷ or jury misconduct during deliberations.³⁹⁸

With respect to ineffective assistance claims, certiorari in this context is particularly significant because the Supreme Court and lower courts have consistently held that claims where counsel performed ineffectively should typically be litigated in the post-conviction process, rather than in the trial and direct appeal.³⁹⁹ In the test for assessing whether counsel has

394. *E.g.*, COLO. REV. STAT. ANN. § 18-1-410(1) (West 2013) (“[E]very person convicted of a crime is entitled as a matter of right to make applications for post-conviction review.”).

395. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

396. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring prosecutor to disclose exculpatory evidence to the defense).

397. Juror misconduct may arise in the course of trial when jurors fail to disclose information or respond falsely to questions raised in voir dire which are material to the defendant’s exercise of peremptory challenges. *See Ex parte Burgess*, 21 So. 3d 746, 749 (Ala. 2008) (providing examples of information the defense counsel was unaware of when able to exercise peremptory strikes). *Burgess* was convicted of capital murder and initially sentenced to death, but after reversal and remand he was sentenced to life imprisonment. *Id.* at 747. The intermediate court concluded that the claims of juror misconduct were not cognizable in state post-conviction proceedings under ALA. R. CRIM. P. 32 because they could have been discovered through investigation and raised in a motion for new trial, permitting review on direct appeal. *Id.* at 750. The supreme court reversed, finding that *Burgess* could not reasonably have discovered the juror misconduct in time to include these allegations in his motion for new trial or appeal. *Id.* at 754.

398. For instance, jury misconduct can occur when evidence excluded from trial is inadvertently provided to jurors during deliberations and can contribute to an improper verdict. *Larimore v. State*, 833 S.W.2d 358, 360 (Ark. 1992).

399. *See Massaro v. United States*, 538 U.S. 500, 500–01 (2003) (“When a claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record that is not developed precisely for, and is therefore often incomplete or inadequate for, the purpose of litigating or preserving the claim.”). However, an ineffective assistance claim directed at trial counsel’s performance might be litigated in the direct appeal process if initially presented in a motion for new trial, affording the parties time to develop evidence relating to counsel’s performance in an evidentiary hearing. This provides a record upon which the trial court can rule and the appellate court, on direct appeal, can review. *See, e.g.*, *Missildine v. State*, 863 S.W.2d 813, 818 (Ark. 1993) (“Although Rule 37 generally provides the procedure for post-conviction relief due to ineffective counsel, this court has recognized such relief may be awarded a defendant on direct appeal in limited circumstances.”). In *Weaver v. Massachusetts*, for instance, the Court granted certiorari to review the petitioner’s claim of ineffective assistance based on

performed defectively, the first prong of *Strickland* requires the petitioner challenging counsel's performance to demonstrate that counsel's claimed deficiency was objectively unreasonable.⁴⁰⁰ The Court explained:

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."⁴⁰¹

Thus, in determining whether counsel's performance met the Sixth Amendment requirement for effective representation,⁴⁰² the Court directed that counsel's decisions must be judged by the facts of the case "viewed as of the time of counsel's conduct."⁴⁰³ This means counsel's effectiveness must be assessed retrospectively—after the conclusion of the proceedings—otherwise, one cannot properly assess whether counsel's strategic decisions were successful.

1. Certiorari: The Final Step in Federal Habeas Corpus Litigation

Consequently, the clear preference for post-conviction litigation of ineffective assistance of counsel claims reflects the need for a complete record, including counsel's explanation for a particular course of action, in order to correctly rule on the claim.⁴⁰⁴ Almost all ineffective assistance claims will present federal constitutional issues.⁴⁰⁵ This warrants review in

trial counsel's failure to object to a violation of his public trial right. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1906–07 (2017). The claim had previously been raised in a motion for new trial and rejected by the state trial court and Massachusetts Supreme Judicial Court. *Id.* at 1907.

400. *Strickland*, 466 U.S. at 687–88.

401. *Id.* at 689.

402. The Sixth Amendment right to assistance of counsel is construed as the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

403. *Strickland*, 466 U.S. at 690.

404. *Strickland* involved the claim that trial counsel was ineffective in failing to call witnesses favorable to the defense at the defendant's capital murder sentencing proceeding. *Id.* at 672–73. Counsel explained that his strategy was to rely on Washington's admission of culpability, rather than character witnesses who would have added little to his defensive strategy. *Id.* at 699. This was found to be reasonable in light of counsel recognizing the trial judge's history of attaching particular importance to the accused's acceptance of responsibility for his actions. *Id.*

405. Arguably, some jurisdictions might apply a higher standard for counsel's performance as a matter of state constitutional law or practice so that a failure to perform effectively might be remedied

both state and federal post-conviction proceedings, except for those arising from arguably defective representation in discretionary or collateral proceedings for which the Court's decisions have recognized no protection under the Sixth Amendment.⁴⁰⁶

There are two distinct routes for review by certiorari for claims initially raised in post-conviction proceedings, following conclusion of the direct appeal. In state post-conviction hearings, the petitioner raising claims arising from federal constitutional protections may petition for review by writ of certiorari once the claims have been fully exhausted in state post-conviction appeal or the discretionary review process.⁴⁰⁷ Alternatively, federal and state court defendants who have petitioned unsuccessfully for relief in proceedings under Sections 2255⁴⁰⁸ or 2254,⁴⁰⁹ respectively, may ultimately petition the Court for review by certiorari once the relevant court of appeals has rejected their claims.⁴¹⁰

Petitions to the courts of appeals are not a matter of right, however, and federal and state court defendants are required to obtain leave to proceed for review of district court determinations.⁴¹¹ Appellate review of an

in state court proceedings, but would not state a federal constitutional claim affording the district court jurisdiction in federal habeas corpus. *See, e.g., infra* notes 480, 482–94 (noting jurisdictions holding the Court's decision in *Padilla v. Kentucky* requiring counsel to inform client of mandatory deportation possibility would be applied retroactively under state law). But *Strickland* is the dominant, if not universal, standard. *E.g., Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986) (finding *Strickland* standard consistent with prior state law and adopting *Strickland*); *see also Luna v. Solem*, 411 N.W.2d 656, 657–58 (S.D. 1987) (holding the higher standard for counsel's performance previously applicable would be abrogated with adoption of *Strickland* test for state prosecutions). In *Weaver v. Massachusetts*, the Court held the state law ineffective assistance test, which provided that counsel's defective performance resulted in prejudice as a result of failure to challenge structural error, would not relieve petitioner of the burden of demonstrating prejudice from violation of public trial right as a matter of Sixth Amendment right to effective assistance. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017).

406. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (holding there is no constitutional right to assistance of counsel for indigent state court defendants sentenced to death); *Pennsylvania v. Finley*, 481 U.S. 551, 555–56 (1987) (asserting there is no Sixth Amendment right to assistance of counsel for an indigent litigant during a collateral attack of a conviction or sentence); *Ross v. Moffitt*, 417 U.S. 600, 618–19 (1974) (holding there is no Fourteenth Amendment violation when the state does not afford an indigent defendant counsel for purposes of the state appellate process once counsel has provided representation to the defendant in the initial appeal).

407. *See supra* Part IV, especially notes 64–73 and accompanying text.

408. *See supra* note 42.

409. *See supra* notes 4 and 21.

410. *See supra* Part IV, especially notes 66–73 and accompanying text.

411. 28 U.S.C. § 2253(c)(1) (2018).

adverse decision rendered by the district court in a Section 2255 proceeding is dependent upon issuance of a certificate of appealability, as provided in Section 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).⁴¹²

The process for obtaining the necessary Certification of Appealability (COA) is not precisely specified in the statute.⁴¹³ The petitioner should initially request issuance of the COA for those issues on which appeal is sought, although often the district court—or magistrate judge, sitting in the fact-finding process for the district judge—will include a ruling on the COA in the order that will eventually be entered.⁴¹⁴ If the district court enters an order denying the COA in whole or part, the petitioner may then file for the COA in the court of appeals.⁴¹⁵ There is no process proscribed for filing the request in the court of appeals; however, the Eighth Circuit, for instance, explains such requests are treated as motions requiring compliance with motion rules.⁴¹⁶ Significantly, the COA may encompass all or only some of the issues presented in the petition and decided adversely to the petitioner

412. *Id.* § 2253(c).

413. *Id.*

414. 6 MARK S. RHODES, *Rules Governing Section 2255 Proceedings*, in ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES app. C (2019).

415. *Id.*

416. *See* EIGHTH CIRCUIT APPELLATE PRACTICE MANUAL § 19.3F (8th ed. 2018) (asserting the normally applicable motion rules outlined in the Motions Practice and Summary Disposition on Appeal apply, including page limits, copies to be filed, and service of process).

and the order granting the COA must specify the issues upon which the district court finds that the COA is appropriate.⁴¹⁷

The COA issuance test was set by the Supreme Court in *Slack v. McDaniel*,⁴¹⁸ and requires the petitioner to show that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’”⁴¹⁹ This suggests there is some tension or overlap, in theory, between the test for relief on the claim asserted in the federal habeas petition and the COA test.⁴²⁰ In order to obtain relief in Section 2254, the petitioner must show that the state court’s decision was unreasonable, not simply incorrect; as such, if reasonable jurists disagree on the reasonableness of the state court decision, the habeas court should defer to the state court’s determination of the legal issues.⁴²¹ If either the district or circuit court grants a COA, however, that determination indicates reasonable jurists *disagree* about the habeas court’s denial of relief on the claim upon review of the state court ruling.⁴²²

As the Court found in *Hohn v. United States*,⁴²³ if the circuit court denies a COA, the statutory scheme permits the habeas petitioner to seek review

417. See *id.* (“The certificate must specify the issue or issues that satisfy the showing . . . and the court of appeals will limit its review to those issues on which appeal is granted.”).

418. *Slack v. McDaniel*, 529 U.S. 473 (2000).

419. *Id.* at 484 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

420. See *id.* at 484–85 (“Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal.”).

421. 28 U.S.C. § 2254(d) (2018). But, if the district court has “grave doubt” about whether the federal habeas petitioner has met the burden of proving a federal constitutional, relief must be granted. *O’Neal v. McAninch*, 513 U.S. 432, 445 (1995) (“[W]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief.”). *O’Neal* was issued prior to amendment of Section 2254 with adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and ultimately may not have survived the statutory amendments as a controlling rule of law. See *Harding v. Walls*, 300 F.3d 824, 828 n.2 (7th Cir. 2002) (questioning the continuing viability of *O’Neal* in light of AEDPA (citing *Anderson v. Cowan*, 227 F.3d 798, 898 n.3 (7th Cir. 2000))).

422. *Slack*, 529 U.S. at 483–84.

423. *Hohn v. United States*, 524 U.S. 236, 247–50 (1998). The Court noted the statutory limitation on its jurisdiction to review decisions of the intermediate appellate courts denying leave for the petitioner to file a successive petition by certiorari set out in 28 U.S.C. § 2244(b)(3)(E). *Id.* at 249. Because no comparable language precluded review of a denial of COA by certiorari, the Court concluded that Congress had not intended to limit its jurisdiction in this respect. *Id.* at 250.

of the denial of appeal by application for certiorari in the Supreme Court. In *Hohn*, the Court held that, because the district and circuit courts refused to grant a COA, upon denial of appeal the Court could consider the denial as a final order of the circuit court, subject to review pursuant to 28 U.S.C. § 1254(1).⁴²⁴

The certiorari petition is, in a sense, a routine element of practice in federal habeas corpus litigation because counsel appointed to represent defendants in federal habeas actions are typically compensated for litigating through certiorari.⁴²⁵ Federal public defenders represent indigent litigants, with private counsel appointed when required by conflict of interest or limited resource issues. Additionally, federal law provides for compensation of counsel representing state court defendants sentenced to death,⁴²⁶ or in non-death cases, when appointment of counsel is warranted by the complexity of issues or potential for meritorious claims.⁴²⁷

Because substantial federal habeas litigation involves challenges to death sentences imposed in state court trials, certiorari is virtually a mandatory step⁴²⁸ in the process of challenging the imposition of the sentence⁴²⁹ or its execution.⁴³⁰ These cases also often resolve important

424. *Id.* at 253.

425. *See supra* note 18.

426. *See* 18 U.S.C. § 3599(a)(2) (2018) (including compensation for representation of defendants challenging death sentences in proceedings under Sections 2255 or 2254); *id.* § 3599(g) (detailing the fees afforded appointed attorneys).

427. 18 U.S.C. § 3006A(a).

428. Some capital defendants, however, elect to waive post-appeal challenges for discretionary proceedings and may do so if competent to make the waiver decision. *Whitmore v. Arkansas*, 495 U.S. 149, 165–66 (1990) (rejecting next friend status for litigant seeking to intervene to prevent execution of competent capital inmate waiving right to challenge death sentence).

429. *E.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009). The petitioner challenged his death sentence in a federal habeas corpus action, initially obtaining relief in the district court on his claim attacking counsel's representation in the capital sentencing process. *Id.* at 31. After the Eleventh Circuit reversed, the Supreme Court granted certiorari and ordered relief, noting:

Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.

Id. at 33; *see also, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (holding counsel rendered ineffective assistance in failing to investigate fully and offer mitigating evidence at a capital sentencing hearing).

430. In challenging the method of execution as violative of the Eighth Amendment prohibition against infliction of cruel and unusual punishment, the Court has recognized that such challenges may

issues governing criminal prosecutions, generally addressing the process for determining the accused's guilt on the capital charge.

An example of the Court's ability and willingness to expand upon existing precedent in the review of an adverse decision rendered by an intermediate court in the federal habeas process is provided in *Kyles v. Whitley*.⁴³¹ After an initial mistrial, Kyles was convicted and sentenced to death even though there were numerous violations of the prosecutorial duty to disclose evidence favorable to the defense, which *Brady v. Maryland*⁴³² held to be a violation of due process.⁴³³ One eyewitness who testified at the first trial later recanted, claiming that she was influenced to identify Kyles by prosecutors who assured her of his guilt and the necessity for her testimony.⁴³⁴

Additionally, the prosecution failed to disclose a significant number of individual items of evidence favorable to Kyles.⁴³⁵ The undisclosed evidence in *Kyles*, alone, ran the gamut of evidence that might be characterized as *exculpatory* with the exception of the confession to the crime by another, as in *Brady*, or scientific evidence, such as DNA evidence, essentially excluding the accused. It included non-disclosure of prior, inconsistent statements by witnesses describing the suspect.⁴³⁶ It also

be raised in civil rights actions brought pursuant to 42 U.S.C. § 1983, ultimately reviewed by the Court in the certiorari process. *See, e.g.,* *Bucklew v. Precythe*, 139 S. Ct. 1112, 1129–30 (2019) (holding that a death sentenced inmate challenging mode of execution used by state authorities as “cruel and unusual” must offer an alternative mode of execution that could be used to carry out the execution “relatively easily and reasonably quickly,” and also requiring that inmate to demonstrate that the alternative method “would significantly reduce a substantial risk of severe pain.”).

431. *Kyles v. Whitley*, 514 U.S. 419, 458 (1995).

432. *Brady v. Maryland*, 373 U.S. 83 (1963).

433. *Kyles*, 514 U.S. at 431–32; *see also* *Illinois v. Fisher*, 540 U.S. 544, 547 (2004) (“We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld.”). *Brady* originally upheld the decision of the state court, finding a violation when the prosecutor failed to disclose the co-defendant's confession to the capital murder in which he admitted that he had actually killed the victim, a fact that might have influenced jurors not to impose a death sentence in *Brady*'s case. *Brady*, 373 U.S. at 84. *Brady* petitioned for certiorari, challenging the remand ordered by the state court was limited to resentencing only, rather than a new trial. The Court upheld the state court's limited remand, holding that the failure to disclose exculpatory evidence relevant to either the guilt or sentencing phases of a case violates due process. *Id.* at 87.

434. *Kyles*, 514 U.S. at 431 n.6.

435. *Id.* at 431.

436. *Id.* at 423. The descriptions of the suspect given by the six eyewitnesses were inconsistent as to age, height, build, facial hair and hair style. All six described the suspect as black. *Id.*

included evidence tending to exclude the defendant by impeaching a conclusion drawn by police; here, a list of license plates of cars found at the scene of the robbery and recorded by police did not include the plate from Kyles's car, undermining the police theory that he had driven to the location.⁴³⁷

The police relied extensively on information supplied by an informant, "Beanie," who used different names in his discussions with police,⁴³⁸ and whose credibility was possibly in doubt because of his romantic interest in Kyles's wife.⁴³⁹ "Beanie" provided information leading police to the discovery of the murder weapon and the victim's purse.⁴⁴⁰ Further, "Beanie" was a suspect in a similar crime,⁴⁴¹ and admitted to officers that he thought he might be suspected in the crime for which Kyles was later prosecuted.⁴⁴² Because of these significant factors potentially influencing "Beanie" to implicate Kyles in order to exculpate himself in the commission of the murder and theft of the victim's automobile, the credibility of the prosecution's case at Kyles's retrial was ultimately considered questionable.⁴⁴³

In the Fifth Circuit,⁴⁴⁴ Judge King offered a thorough analysis of the quantity and significance of evidence developed after the retrial, but not disclosed to Kyles's defense counsel, that undermined the credibility of the prosecution's case.⁴⁴⁵ Her review of the trial evidence in light of the undisclosed evidence known to the prosecution, or members of the prosecution team, led her to conclude:

437. *Id.* at 423–24.

438. *See id.* at 424 n.3 (noting the witness's use of "so many aliases" leading the majority to refer to him as "Beanie" throughout its opinion).

439. *See id.* at 424 n.4 (noting Kyles was the common law husband of the sister of Beanie's roommate). The defense contended that Beanie's romantic interest in Kyles's common law wife gave him a motive to implicate Kyles and remove him as an "impediment" to establishing a relationship with her. *Id.* at 428.

440. *Id.* at 425. Beanie told police that if Kyles were "smart" he would discard the purse in his garbage the following day. Perhaps not surprisingly, police recovered the victim's purse from Kyles's garbage. *Id.* at 429.

441. *Id.*

442. *Id.* at 425. Beanie's concern was apparently grounded in the fact that he had been driving the car owned by the victim of the murder. He claimed that he had purchased the car from Kyles. *Id.*

443. *Id.* at 430.

444. *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993).

445. *Id.* at 820–44 (King, J., dissenting).

With deference to my distinguished and able colleagues in the majority, I dissent from their affirmance of the district court's denial of the writ of habeas corpus. For the first time in my fourteen years on this court—during which I have participated in the decision of literally dozens of capital habeas cases—I have serious reservations about whether the State has sentenced to death the right man. My reservations are directly relevant to the two main constitutional claims that Kyles has raised—an ineffective-assistance-of-counsel claim and a *Brady* claim.⁴⁴⁶

Her arguments proved persuasive for a majority of the Court on certiorari. Yet, Justice Scalia wrote a vigorous dissent, complaining that the Court should not have granted certiorari for the purpose of correcting error in the lower court.⁴⁴⁷

Although the Justices would generally agree with Justice Scalia's view concerning error correction in *Kyles*,⁴⁴⁸ his observation failed to address the

446. *Id.* at 820. In concluding her dissent, Judge King reiterated her view that the constitutional violations warranted reversal of Kyles's conviction, while also expressing her concern about the reliability of the prosecution's case in charging him, leading her to note "Judge Learned Hand once wrote that '[o]ur procedure has always been haunted by the ghost of an innocent man convicted. It is an unreal dream.' I fear that in this instance it is not simply a dream. I therefore dissent." *Id.* at 844 (citation omitted) (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923)).

447. *Kyles v. Whitley*, 514 U.S. 419, 457–58 (1995) (Scalia, J., dissenting). Chief Justice Rehnquist, Justice Kennedy and Justice Thomas joined Justice Scalia's dissent. He wrote:

The greatest puzzle of today's decision in what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. *The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.*

Id. (emphasis added).

448. *E.g.*, *Overton v. Ohio*, 534 U.S. 982, 982 (2001) (Breyer, J., statement respecting denial of certiorari). Justice Breyer explained:

I consequently conclude that the City of Toledo clearly violated the Fourth Amendment warrant requirement. Because the Court already has answered directly the basic legal question presented in this case, I would not grant certiorari for the purpose of hearing that question argued once again. I would, however, summarily reverse the decision below. *I realize that we cannot act as a court*

important development in *Brady*, the disclosure duty that characterized the majority's concern in granting review. The majority was concerned that the cumulative effect of undisclosed evidence favorable to the defense undermined the credibility of the capital conviction.⁴⁴⁹ The majority pointed to the conclusions of the two Fifth Circuit panel members who voted to uphold the conviction that individual items of undisclosed evidence would not have been sufficient,⁴⁵⁰ alone, to meet the *Brady* test, which requires a showing of a reasonable probability that, but for the non-disclosure, "the result of the proceeding would have been different."⁴⁵¹ The majority characterized their approach:

There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone.⁴⁵²

Thus, the majority concluded: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*["⁴⁵³ It then proceeded to explain why the cumulative effect of the individual items of evidence favorable to the defense undermined the credibility of the prosecution's case.⁴⁵⁴

of simple error correction and that the unpublished intermediate court decision below lacks significant value as precedent. Nonetheless, the matter has a general aspect. . . . [T]he clarity of the constitutional error convinces me that the appropriate disposition of this case is a summary reversal.

Id. (emphasis added).

449. *Kyles*, 514 U.S. at 421 (explaining the proper application of *Brady* disclosure obligation turns on "cumulative effect" of undisclosed evidence).

450. *Id.* at 440.

451. *See id.* at 433–34 (citing *United States v. Bagley*, 433 U.S. 667, 682 (1985)) (refining *Brady* test for relief).

452. *Id.* at 440 (citation omitted).

453. *Id.* at 441.

454. *Id.* at 441–45.

The majority's refinement of the rule governing the prosecution's duty to disclose exculpatory evidence, that multiple non-disclosures must be assessed cumulatively for probable prejudice to the defendant's right to due process and fair trial, reflected express recognition in the refinement—by expansion—of the *Brady* disclosure principle.⁴⁵⁵ Justice Scalia's complaint simply ignored the fact that the majority's approach in *Kyles* reflected more than a simple correction of error. It resulted in an important expansion of law governing the scope of review of multiple claims of *Brady*-disclosure duty violations arising in a single criminal prosecution.⁴⁵⁶ *Kyles* demonstrates the Court's ability to use the certiorari process available at the conclusion of the federal habeas corpus process to announce such a refinement, if not a new rule, of constitutional criminal procedure.

2. Certiorari Following Conclusion of State Post-Conviction Proceedings

Once the state court defendant has petitioned for post-conviction relief and exhausted the state court remedies, the defendant has the option of petitioning for review of his federal constitutional claim by writ of certiorari to the Supreme Court. The decision, or determination, rejecting the claim by the “highest court of the state” that could have granted relief will constitute a final order authorizing review by the Court pursuant to § 1257(a).⁴⁵⁷ Any doubt as to the Court's supremacy with respect to

455. Thus the Court's decision in *Kyles* did not simply involve application of existing doctrine to correct procedural error, but actually included formal articulation of a new principle governing disposition of due process claims arising under *Brady*. See *Kyles*, 514 U.S. at 436–38 (stating the prosecutor's “responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.”).

456. *Brady* requires disclosure of exculpatory evidence in the possession of the prosecution to the defense, regardless of whether the evidence was exculpatory on the question of the accused's guilt, or the sentence imposed. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963). Subsequently, in *United States v. Agurs*, the Court held that disclosure was an affirmative obligation for prosecutors and not dependent upon timely request for discovery by defense counsel. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The Court expanded the scope of the disclosure duty in *Bagley*, holding that the duty was not restricted to exculpatory evidence, but included material impeachment evidence. *Bagley*, 473 U.S. at 675–76. The *Kyles* holding was critical in directing reviewing courts to consider the cumulative impact of multiple infractions under the test for establishing a due process violation; whether there was a reasonable probability that but for the failure to disclose, the outcome would have been different. *Kyles*, 514 U.S. at 434. It also resolved, finally, that disclosure was not limited to evidence in the possession of the prosecutor, but covered evidence in the possession of law enforcement investigators, as members of the prosecution team. *Id.* at 437–38.

457. See *supra* text accompanying note 47.

deference required of state courts to its authority in interpreting federal constitutional protections was resolved in *Montgomery v. Louisiana*.⁴⁵⁸ There, the Court held that state post-conviction courts are bound by its rulings, and required Louisiana to apply *Miller v. Alabama*.⁴⁵⁹

Consequently, while state post-conviction courts considering federal constitutional claims are required to properly comprehend Supreme Court precedent, there is the possibility that state defendants will assert federal constitutional challenges that have not yet been addressed by the Court. The claims presented that are neither foreclosed, nor dictated by its precedent may be particularly ripe issues for review by certiorari once they have been fully exhausted in the state proceedings. Claims of ineffective assistance of trial or appellate counsel are clearly within the scope of certiorari provided that they have been predicated on Sixth Amendment violations, but other claims of federal constitutional violations may be cognizable as well.

Thus, in *Yates v. Evatt (Yates IV)*,⁴⁶⁰ the Court engaged in a rather lengthy battle⁴⁶¹ with the South Carolina courts with respect to the claim that the jury instructions given at petitioner's state trial unconstitutionally shifted the burden of proof to the accused.⁴⁶² The Court reversed the state supreme court, which had denied relief without issuing an opinion, and remanded.⁴⁶³ On remand, the state court found the jury instruction unconstitutional, but concluded that the error was harmless,⁴⁶⁴ again leading the Court to grant certiorari in *Yates v. Aiken (Yates II)*,⁴⁶⁵ out of concern that the state court

458. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

459. *Miller v. Alabama*, 567 U.S. 460 (2012).

460. *Yates v. Evatt (Yates IV)*, 500 U.S. 391 (1991).

461. *See id.* at 393 ("This murder case comes before us for the third time, to review a determination by the Supreme Court of South Carolina that instructions allowing the jury to apply unconstitutional presumptions were harmless error. We hold that the State Supreme Court employed a deficient standard of review, find that the errors were not harmless, and reverse."). The Court had previously denied certiorari following affirmance of the conviction by the state supreme court on direct appeal. *See Yates v. South Carolina (Yates I)*, 462 U.S. 1124, 1124 (1983) (denying certiorari before Yates asserted his federal due process claim in state post-conviction proceedings).

462. The Court initially granted review on the claim that the jury instruction violated the due process protection afforded by *Sandstrom v. Montana*, 442 U.S. 510 (1979), and its decision in *Francis v. Franklin*, 471 U.S. 307 (1985), which was issued while the state habeas corpus petition was pending. *Yates v. Aiken (Yates II)*, 474 U.S. 896 (1985).

463. *Id.*

464. *State v. Yates*, 391 S.E.2d 530, 531 (S.C. 1989).

465. *Yates v. Aiken (Yates III)*, 484 U.S. 211, 214 (1988).

had failed to consider the retroactive effect of *Francis v. Franklin*.⁴⁶⁶ The Court held the result in *Francis* to be dictated by *Sandstrom v. Montana*,⁴⁶⁷ and therefore, applicable in Yates's state court proceeding.⁴⁶⁸

The Court granted certiorari for a third time,⁴⁶⁹ and again reversed the state supreme court's disposition on the federal due process claim.⁴⁷⁰ On this final reversal, the Court did not remand for consideration of harm, explaining: "Because this case has already been remanded twice, once for harmless-error analysis, we think we would serve judicial economy best by proceeding now to determine whether the burden-shifting jury instructions were harmless."⁴⁷¹ Ironically, within just over six months, a majority rejected the specific language used in *Yates IV*, respecting the test for prejudice when reviewing a due process claim based on impermissible burden-shifting to the defense.⁴⁷²

Yates represents the rare case where a federal constitutional claim that was not resolved on direct appeal is reviewed by certiorari after being rejected in the state post-conviction process. The more likely claim being raised in state post-conviction proceedings is one addressing counsel's alleged ineffectiveness. The requirement for exhaustion of federal claims in the trial and appellate process through the highest state court as a predicate for certiorari under Section 1257(a),⁴⁷³ combined with the policy preference for development of ineffective assistance claims in post-conviction

466. *Francis v. Franklin*, 471 U.S. 307 (1985); see *Yates III*, 484 U.S. at 212–13 (explaining that while the state habeas petition was pending, they delivered an opinion on unconstitutional burden-shifting jury instructions in *Francis*, which the state court failed to consider when it denied relief without opinion).

467. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

468. *Yates III*, 484 U.S. at 214.

469. *Yates IV*, 500 U.S. 391, 400 (1991) ("Because the Supreme Court of South Carolina appeared to have applied the wrong standard for determining whether the challenged instructions were harmless error, and to have misread the record to which the standard was applied, we granted certiorari to review this case a third time.").

470. *Id.* at 411.

471. *Id.* at 407.

472. See *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991) (rejecting the test based on what a "reasonable juror" "could" or "would have done" in light of a challenged jury instruction as referenced in *Yates*, and instead focusing on "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990))).

473. See *supra* text accompanying note 47.

proceedings,⁴⁷⁴ makes state post-conviction process a virtual necessity for state court defendants challenging their convictions or sentences on federal constitutional grounds. Consequently, review by certiorari following rejection by state courts is critical when relief will require a creative response by either imposing a new rule, or significantly expanding or refining existing Supreme Court precedent.

The Court's decisions in two cases where certiorari was granted after denials of relief in state proceedings, *Padilla v. Kentucky*⁴⁷⁵ and *Hinton v. Alabama*,⁴⁷⁶ demonstrate the potential significance for development of ineffective assistance law. In both cases, the issues addressed might have been raised on direct appeal had they been preserved by a motion for new trial, but the fact that they were not did not bar state post-conviction review, or ultimately, review by the Court.⁴⁷⁷

In *Padilla*, the Court considered a claim of particularly important political significance: whether trial counsel has a duty to advise an accused non-citizen that the consequence of conviction would subject him to immediate deportation.⁴⁷⁸ *Padilla* had been a legal resident of the United States for forty years and served in the Vietnam War, but was charged with trafficking marijuana.⁴⁷⁹ *Padilla* claimed his counsel advised he "did not have to worry about immigration status since he had been in the country so long," and that he "relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory."⁴⁸⁰

474. See *Massaro v. United States*, 538 U.S. 500, 504 (2003) ("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.").

475. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

476. *Hinton v. Alabama*, 134 S. Ct. 1081 (2014).

477. See *id.* at 1083 (addressing whether "Hinton's trial attorney rendered constitutionally deficient performance."); *Padilla*, 559 U.S. at 360 (determining whether *Padilla*'s counsel had an obligation to advise him that his guilty plea would lead to deportation).

478. *Padilla*, 559 U.S. at 359. Deportation consequences of criminal prosecutions are significant because of the numbers of exposed undocumented individuals. *Id.* at 360.

479. *Id.* at 359.

480. *Id.* (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)). The state supreme court granted the Commonwealth's petition for discretionary review and reversed the decision of the appellate court, which remanded the case for an evidentiary hearing in the circuit court of conviction sitting as the post-conviction court, pursuant to KY. R. CR. 11.42. *Padilla*, 253 S.W.3d at 483.

Padilla reflects the Court's recognition of deportation as a "particularly severe penalty"⁴⁸¹ as a collateral consequence of conviction, though it does not directly impact the sentencing options available to the court upon conviction.⁴⁸² With respect to this latter distinction, the majority carefully limited the reach of its holding that counsel's failure to admonish Padilla in the circumstances of his case constituted ineffective assistance.⁴⁸³ The majority explained that counsel's representation was defective—the first prong of *Strickland*⁴⁸⁴—because:

Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.⁴⁸⁵

Though the Court held counsel's assistance to be ineffective, it recognized that in less certain situations trial counsel's duty to advise the client might be satisfied by a warning that conviction might result in "a risk of adverse immigration consequences."⁴⁸⁶ However, the Court observed that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."⁴⁸⁷

Padilla reflected the unquestionable significance of the collateral consequence of deportation after conviction and the Court's decision expanded counsel's recognized obligations to advise such at-risk clients.

481. *Padilla*, 559 U.S. at 365.

482. The Court noted:

The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id. at 364.

483. *Id.* at 366 (acknowledging how "deportation as a consequence of a criminal conviction is, . . . uniquely difficult to classify as either a direct or collateral consequence[.]" and concluding that advice regarding deportation does not fall outside the Sixth Amendment right to counsel).

484. The "first prong" is a showing that counsel's performance was, in fact, defective, and not the product of an objectively reasonable strategy undertaken by counsel in light of the circumstances of the case. See *supra* notes 395–99 and accompanying text.

485. *Padilla*, 559 U.S. at 368–69.

486. *Id.* at 369.

487. *Id.*

The Kentucky court found that counsel had no duty to advise the client of the “collateral consequence” of deportation, holding that such advice was “outside the scope of representation required by the Sixth Amendment,” and thus not a basis for an ineffective assistance claim.⁴⁸⁸ Instead, the majority concluded:

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.⁴⁸⁹

The direct/collateral consequence distinction is, thus, not necessarily determinative of counsel’s duties in advising the client contemplating entering of a guilty plea.⁴⁹⁰ The Court’s observation not only provides a basis for expansion of counsel’s duty to advise the client when deportation is a consequence of conviction, but also suggests that there could be other consequences requiring counsel’s advice with respect to a client’s waiver of trial and entry of a guilty plea.⁴⁹¹ For example, jurisdictions are split over whether trial counsel has a duty to advise a client with respect to mandatory registration as a sex offender⁴⁹² in the event of conviction on the accused’s guilty plea to a qualifying offense.⁴⁹³ Some jurisdictions have held that

488. *Id.* at 365 (quoting *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)).

489. *Id.* at 365 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

490. *See id.* at 366 (stating that the collateral versus direct distinction is ill-suited in evaluating a *Strickland* claim concerning deportation).

491. *Id.* at 370 (rejecting to limit the holding to “affirmative misadvice”).

492. *E.g.*, 18 U.S.C. § 2250 (2018) (criminalizing a knowing failure to register as a sex offender).

493. Some jurisdictions have held that counsel’s failure to properly advise a client facing mandatory registration upon conviction fails to provide effective assistance, satisfying at least the defective performance, or first prong of *Strickland*. *See United States v. Shepherd*, 880 F.3d 734, 742 (5th Cir. 2018) (concluding counsel’s failure to correctly assess defendant’s registration status under Texas law based on out-of-state convictions constituted ineffective assistance); *United States v. Riley*, 72 M.J. 115, 121 (Mil. Ct. App. 2013) (holding military court should not accept guilty pleas requiring registration without determining the accused has been advised of consequences of conviction); *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. App. 2010) (ruling, prospectively, that counsel is required to advise client of registration requirement upon conviction); *Commonwealth v. Thompson*, 548 S.W.3d 881, 892 (Ky. 2018) (rejecting direct/collateral differentiation in holding counsel must advise client of registration consequence in order to provide effective representation); *People v. Fonville*, 804 N.W.2d 878, 890 (Mich. App. 2008) (discussing direct/collateral distinction in consequences of conviction of guilty pleas and holding counsel’s assistance was ineffective on record where accused repeatedly

advice regarding registration is not required for effective representation because it is a “collateral,” not “direct,” consequence of conviction.⁴⁹⁴ Others have followed the Court’s view in *Padilla*, rejecting the direct/collateral distinction in characterization as necessarily determinative of counsel’s duty to advise the client properly with respect to the waiver of trial and entry of a guilty plea that will result in conviction.⁴⁹⁵

Padilla’s importance lies not only in its expansion of counsel’s duties in advising the accused of deportation consequences of conviction from the entry of a guilty plea, but also in petitioning for certiorari following conclusion of the state post-conviction process. The Court’s holding reflects announcement of either a new rule, or the expansion of application of existing precedent, that could not have been initiated in the federal habeas corpus process. Following *Padilla*, with other significant changes in constitutional criminal procedure,⁴⁹⁶ subsequent litigation focused on whether the *Padilla* rule would be applied retroactively to cases finalized at the conclusion of the direct appeal process.

When the argument for retroactive application was made in *Chaidez v. United States*,⁴⁹⁷ the Court held that *Padilla* was not subject to retroactive application, based on *Teague*.⁴⁹⁸ The Court granted certiorari to resolve conflicts in decisions rendered by lower federal and state courts on the issue.⁴⁹⁹ Interestingly, the issue of retroactive application arose in a petition for *coram nobis* relief because the conviction on Chaidez’s guilty plea resulted in imposition of a probated sentence, and she was not in custody on that charge at the time the deportation proceedings were instituted.⁵⁰⁰ But, the

explained that he would not have entered a guilty plea had he been advised that he would be required to register as sex offender upon his conviction).

494. *Thompson*, 548 S.W.3d at 890–91 (citing *People v. Gravino*, 928 N.E.2d 1048, 1049 (2010)).

495. *See id.* at 891–92 (citing *Commonwealth v. Pridham*, 394 S.W.3d 867, 879 (Ky. 2018)) (reviewing discussions of direct/collateral consequence analysis in other jurisdictions and following *Padilla* by rejecting the distinction as determinative with respect to sex offender registration and parole eligibility consequences of conviction as a violent offender).

496. *E.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) was not retroactive).

497. *Chaidez v. United States*, 568 U.S. 342 (2013).

498. *Id.* at 344.

499. *Id.* at 347.

500. *Id.* at 345. The Court explained:

A petition for a writ of *coram nobis* provides a way to collaterally attack a criminal conviction for a person, like Chaidez, who is no longer “in custody” and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241 Chaidez and the Government agree that nothing in this case

procedural distinction between habeas corpus and *coram nobis* had no bearing on the determination that *Padilla* was not retroactive.⁵⁰¹

Thus, while *Padilla* was able to successfully argue that counsel had a duty to advise an accused with respect to immigration consequences of a conviction in explaining waiver of the jury trial right on entry of a guilty plea, he was only able to do so because he raised the federal constitutional claim in state post-conviction proceedings. The *Chaidez* Court rejected her claim for retroactive application of its holding in *Padilla*, finding that it had announced a new rule in imposing this burden on defense counsel.⁵⁰² The lower federal courts could not have expanded counsel's obligation in a habeas action because only the Supreme Court can announce a new rule of federal constitutional procedure,⁵⁰³ and federal habeas relief is only available for review of a decision contrary to or reflecting an unreasonable application of existing Supreme Court precedent.⁵⁰⁴

The Court's explanation of the limitation imposed by *Teague* is particularly important for petitioners who seek to expand upon existing ineffective assistance law, such as recognition of a Sixth Amendment duty to advise an accused of a mandatory duty to register as a sex offender upon conviction. It explained that the application of an existing rule or principle to a different set of facts will not necessarily amount to a *new rule* of constitutional criminal procedure. Thus, within the framework of the effective representation duty,

turns on the difference between a *coram nobis* petition and a habeas petition, and we assume without deciding that they are correct.

Id. at 345 n.1 (citing *United States v. Morgan*, 346 U.S. 502, 507, 510–11 (1954)).

501. *Id.* at 347.

502. *Id.* at 354. Following the decision, immigration lawyers sought to develop strategies for application of *Padilla*'s ineffective assistance obligation retroactively in an effort to avoid the limitation imposed in *Chaidez*. See *Seeking Post-Conviction Relief Under Padilla v. Kentucky After Chaidez v. U.S.*, IMMIGRANT DEF. PROJECT (Feb. 28, 2013), <https://immigrantdefenseproject.org/wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf> [<https://perma.cc/TPC5-9BZS>] (laying out strategies to seek post-conviction relief for clients unaware of immigration consequences of a guilty plea). This strategy was published and available online within eight days of issuance of the decision of *Chaidez* on February 20, 2013. See *id.* ("On February 20, 2013 . . . the Court held . . . that *Padilla* is a 'new rule' that does not apply retroactively to Ms. Chaidez's case.").

503. *Goeke v. Branch*, 514 U.S. 115, 120–21 (1995); *Caspari v. Bohlen*, 510 U.S. 383, 396–97 (1994).

504. 28 U.S.C. § 2254(d)(1) (2018). Section 2254(d)(1) expressly provides that relief may be granted only when the state court ruling on a federal constitutional claim has "resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States* . . ." *Id.* (emphasis added).

defective performance may be assigned to factually novel circumstances not previously addressed, but rather clearly included within the general duty recognized under *Strickland*.⁵⁰⁵

Padilla also illustrates another option for state court defendants whose claims of ineffective assistance of counsel may rest precariously on whether the Supreme Court would view the consequences of conviction as direct or collateral. Direct consequences will require counsel's accurate advice in order to ensure that a client pleading guilty understands the ramifications of the conviction that will be imposed. But collateral consequences, even on such important matters as parole eligibility,⁵⁰⁶ may not fall within the ambit of effective assistance expected of counsel, though deportation clearly illustrated the lack of satisfaction with the dichotomy leading the *Padilla* Court to impose the duty to advise clients with immigration consequences in accordance with applicable law. But *Padilla* also serves to remind counsel that another potentially important option in state post-conviction argument that trial or appellate counsel failed to perform effectively lies in arguing the claim as a matter of state law.

Thus, even though *Chaidez* concluded that *Padilla* had announced a *new* rule not retroactive in federal habeas litigation, this limitation did not foreclose some jurisdictions from holding to the contrary. Exercising independent jurisdiction under state law, following the Court's holding in *Danforth v. Minnesota*,⁵⁰⁷ Massachusetts⁵⁰⁸ and New Mexico courts⁵⁰⁹ have

505. *Chaidez v. United States*, 568 U.S. 342, 348 (2013) (“[G]arden-variety applications of the test in *Strickland*, for assessing claims of ineffective assistance of counsel do not produce new rules”).

506. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The Court held that the petitioner who failed to allege prejudice resulting from counsel's error in incorrectly advising him of the parole eligibility rules upon conviction failed to demonstrate ineffectiveness, but did so without resolving the issue of whether counsel's failure to accurately advise the client of parole eligibility upon conviction would fall within the ambit of obligation under the Sixth Amendment. The *Chaidez* Court admitted that it had not addressed the issue directly. *Chaidez*, 568 U.S. at 349–50.

507. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

508. See, e.g., *Commonwealth v. Clarke*, 949 N.E.2d 892, 907 (Mass. 2011) (holding *Padilla* “is to be retroactively applied to convictions obtained on or after April 1, 1997”).

509. See *Ramirez v. State*, 333 P.3d 240, 241, 244–45 (N.M. 2014) (explaining that counsel in New Mexico prosecutions had been required to inform clients of immigration consequences of conviction on guilty pleas, specifically including compliance with NMRA Form 9-406 (9), adopted in 1990). This form requires the trial court to find that an accused pleading guilty or no contest be warned about potential immigration consequences of conviction, providing: “That the defendant understands that a conviction may have an effect upon the defendant's immigration or naturalization status[j]” and that, if the defendant is represented by counsel, the defendant has been advised by counsel of the immigration consequences of the plea. *Id.* at 245. The court found that the record did not support

held that as a matter of effective assistance under state law, failure to properly advise clients facing immigration consequences from guilty pleas leading to conviction constituted ineffective assistance that could be asserted even after their cases became final.⁵¹⁰

In contrast to the widespread application of the duty imposed in *Padilla*, the *Hinton* Court's decision to review a capital conviction where the death sentence was imposed addressed ineffectiveness in a far more limited factual scenario.⁵¹¹ The Court reviewed an ineffective assistance claim, initially raised in state post-conviction proceedings, where the prosecution's case was based upon an eyewitness identification of Hinton by the survivor of a similar robbery-shooting.⁵¹² Two similar crimes were committed in the span of a few months, where the assailant fired twice during each robbery.⁵¹³ Police recovered a .38 caliber revolver from Hinton's residence, which ballistics testing linked to the bullets recovered from the three robberies.⁵¹⁴

The ballistics evidence was not only critical to the prosecution's theory, but to the defense as well.⁵¹⁵ The trial court, concerned about the need for expert testimony, offered to provide funds beyond the erroneously cited statutory limit of \$500 for defense counsel to retain a qualified expert, but counsel declined the offer.⁵¹⁶ The Court noted the misunderstanding, stating "[t]he attorney failed to do so because he was himself unaware that Alabama law no longer imposed a specific limit and instead allowed reimbursement for 'any expenses reasonably incurred.'"⁵¹⁷ Instead, defense

compliance with Form 9-406 with respect to Ramirez's guilty plea entered in 1997 and, as a result, recognized his option to proceed on a claim of ineffective assistance of counsel on remand. *Id.* at 247. In a pre-*Padilla* decision, *State v. Paradez*, the New Mexico Supreme Court held that counsel had an affirmative duty to properly advise the client on immigration consequences of a conviction, noting the general contrary authority, but pointing to established decisions holding that counsel's misrepresentation of deportation consequences had been found to demonstrate defective performance. *State v. Paradez*, 101 P.3d 799, 804–05 (N.M. 2004).

510. *Ramirez*, 333 P.3d at 241, 247; *Paradez*, 101 P.3d at 804–05.

511. *Hinton v. Alabama*, 571 U.S. 263, 270–72 (2014).

512. *Id.* at 264–65.

513. *Id.*

514. *Id.*

515. *See id.* at 265 (stating the six bullets and the revolver were the only physical pieces of evidence that could be used to identify the perpetrator).

516. *Id.* at 266–67.

517. *Id.* at 267.

counsel retained an individual whose expertise the lawyer himself believed to be inadequate because he could not find a more qualified expert with the limited funds.⁵¹⁸ He admitted he failed to hire an expert capable of providing a credible expert opinion, explaining at the post-conviction evidentiary hearing “it was *my failure, my inability under the statute* to obtain any more funding for the purpose of hiring qualified experts.”⁵¹⁹

However, the evidence at the hearing actually showed that trial counsel refused the trial court’s offer to provide additional funding for the defense to obtain the assistance of a qualified ballistics expert.⁵²⁰ Three highly qualified experts testified that the unqualified “expert” called at trial failed to properly contest the prosecution’s theory of defendant’s involvement in the capital murder, and was thoroughly discredited on cross-examination.⁵²¹ In contrast, the three experts who testified at the post-conviction evidentiary hearing had significant experience as experts in toolmark identification—one had served as chief of the FBI’s “toolmark unit” before his retirement—and none found that the prosecution’s expert testimony linking the bullets recovered from the robberies to Hinton’s gun was accurate.⁵²²

Based on the post-conviction evidence, the *Hinton* Court found that trial counsel’s decision to not accept the funding offered by the trial court was unreasonable considering all the circumstances.⁵²³ It concluded that under the *Strickland* standard for performance by counsel “it was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at \$1,000.”⁵²⁴

518. *Id.* at 267–68.

519. *Id.* at 268.

520. *Id.* at 273.

521. *Id.* at 269–70. The witness who testified as a defense expert at trial had a degree in civil engineering, and his only experience “was in military ordnance, not firearms and toolmark identification.” *Id.* at 269. This was stressed by the prosecutor in closing argument, who compared the defense expert’s conclusion that the bullets in the three robberies were not fired from the same weapon, with testimony from two highly qualified experts called by the State who opined that all six recovered bullets from the three robberies had been fired from the same weapon. *Id.* Moreover, on cross-examination, the defense expert admitted he had only testified twice with respect to toolmark identification in the preceding eight years, he had experienced difficulty in using the microscope at the crime lab, and he only has one eye. *Id.*

522. *Id.* at 270.

523. *Id.* at 274.

524. *Id.* at 273.

But, in ordering relief, the Court carefully limited its holding to the precise factual context in which Hinton's claim arose, rather than imposing a *new* rule to defense counsel's exercise of professional judgment in employing expert witnesses in support of a defensive theory for trial.⁵²⁵ It explained:

We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.*⁵²⁶

The Court thus emphasized that the error in *Hinton* was based on the critical fact that counsel—*he himself* (emphasis in original)—recognized that the "expert" he retained was critical to its disposition.⁵²⁷ No broad pronouncement concerning duties of counsel with respect to retaining expert witnesses or ensuring the quality of their opinions or testimony was under scrutiny in the case.⁵²⁸ Instead, the peculiar facts leading to Hinton's convictions and death sentence were key to the holding that counsel's representation was defective and probably prejudicial in light of the expert testimony developed at the post-conviction hearing.⁵²⁹

While the Court held that its decision in *Padilla* announced a new rule not subjective to retroactive application, as it later held in *Chaidez*,⁵³⁰ the disposition in *Hinton* raises the question of whether the finding of ineffectiveness warranting relief under the Sixth Amendment and *Strickland* could have been announced in the federal habeas process. *Hinton* involved

525. *Id.* at 274–75.

526. *Id.* (emphasis added) (citation omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

527. *Id.*

528. *Id.* at 274.

529. *Id.* at 274–75.

530. In *Chaidez*, the Court explained: "when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes." *Chaidez v. United States*, 568 U.S. 342, 348 (2013).

nothing more than the application of *Strickland* to novel facts and, therefore, did not announce a *new* rule.⁵³¹ In this context, the *Chaidez* Court explained that “*Padilla* would not have created a new rule had it only applied *Strickland*’s general standard to yet another factual situation—that is, had *Padilla* merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent.”⁵³² But there, the Court found that *Padilla* involved more than a mere application of *Strickland* to a novel set of facts; instead, it asked whether *Strickland* would apply to the failure to advise the client of immigration consequences upon conviction at all.⁵³³

So, would one expect a federal habeas court to apply *Strickland* to these peculiar facts? If so, because the *Hinton* Court itself admonished that it was not developing a new doctrinal test governing defense counsel’s duties regarding the use of expert testimony at trial, it clearly did not intend its decision to be taken as an announcement of a *new* rule to be applied prospectively for ineffective assistance claims based on arguably defective use of expert evaluation or testimony. If the factual scenario presented by *Hinton* were so obviously subject to relief on the merits based on application of *Strickland*, then why did the Court grant certiorari, vacate the judgment of the Alabama Court of Criminal Appeals, and remand for consideration of probable prejudice resulting from trial counsel’s deficient performance?⁵³⁴ Why not simply assume that the issue would be addressed in the federal habeas litigation and resolved in the same way the Court did?

The problem may well lie in the statutory requirement that implicitly requires federal habeas courts defer to state court decision-making, even when the state court’s decision is wrong.⁵³⁵ The statute does not afford federal habeas relief on the basis of a wrongly decided state court disposition, but requires more deviation from the norm, an “unreasonable application” of Supreme Court precedent.⁵³⁶ *Hinton*’s counsel’s defective

531. The Court explained: “This case calls for a straightforward application of our ineffective-assistance-of-counsel precedents, beginning with *Strickland v. Washington*.” *Hinton*, 571 U.S. at 272.

532. *Chaidez*, 568 U.S. at 348–49.

533. *Id.* at 349.

534. *Hinton*, 571 U.S. at 276.

535. See 28 U.S.C. § 2254(d)(1) (2018) (providing a guideline for evaluating whether review of a state law may take place); see also *supra* text accompanying note 4.

536. *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (O’Connor, J., concurring in part). “Under § 2254(d)(1)’s ‘unreasonable application’ clause, then, a federal habeas court may not issue the writ

performance might reflect simply a “garden variety” application of *Strickland*, but if so, why did the Court grant certiorari and issue its per curiam order reversing? If resolution of the claim was simplistic, in that it turned only on the essential fact that trial counsel rejected the trial court’s offer of additional funds for the hiring of a more highly qualified expert on ballistics, why did Hinton’s claim satisfy the Court’s general test for “certworthiness?”⁵³⁷ Pursuant to RULE 10, while the Court reserves the right to review cases that do not fit within its general criteria for certiorari,⁵³⁸ the best explanation might be that the Alabama Court of Criminal Appeals decision was simply so beyond reason that summary reversal by per curiam was deemed necessary.⁵³⁹

Kyles, *Padilla*, and *Hinton* reflect different contexts where the certiorari petition following denial of relief in post-conviction litigation is particularly significant. *Kyles* demonstrates the Court’s willingness to articulate a refinement in existing precedent that addresses an important issue—assessment of *Brady* violations cumulatively to determine whether the defense has probably been impaired by failure to disclose favorable evidence—when that refinement might have been beyond the appellate court’s perceived authority or need to do so. It signals that the last step in federal habeas may be essential to obtaining relief on a proposition that lower courts might have disregarded, or that Justice Scalia would regard as *error correction* and unworthy of the Court’s exercise of its jurisdiction to grant the writ.

Padilla and *Hinton* both reflect dispositions that might never have gained

simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

537. See SUP. CT. R. 10(b) (“[A] state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[.]”)

538. See *id.* R. 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, *although neither controlling nor fully measuring the Court’s discretion*, indicate the character of the reasons the Court considers . . .”).

539. Similarly, in *Youngblood v. West Virginia*, the Court ordered relief by per curiam based on a *Brady* violation committed when a state trooper ordered destruction of a note purportedly written by one of the victims of sexual assault, for which Youngblood was convicted, taunting him and indicating sensual-sex, which directly contradicted the prosecution’s theory. *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006), *rev’g* 618 S.E.2d 544 (2005). On appeal, the convictions were upheld by the state, the Supreme Court noted: “A bare majority of the Supreme Court of Appeals of West Virginia affirmed.” *Id.* at 869.

the attention of federal habeas courts because they appeared to deviate too greatly from *Strickland*'s core holding to be considered "garden variety" application of the test for ineffectiveness in counsel's representation. *Padilla* demonstrates the value of petitioning for certiorari following denial of relief in state post-conviction proceedings in order to argue for a broadening of counsel's duty to advise the accused of immigration consequences of a conviction on entry of a guilty plea. *Hinton*, by contrast, reflects error correction necessitated by egregious facts that demand correction appropriately through per curiam disposition, highlighting the fact that the holding is limited to the unique factual scenario before the Court.

VII. CONCLUSIONS

The importance of certiorari for criminal defendants is reflected in the ABA Standards for Criminal Justice, which supports the provision of counsel for this step in the post-trial process:

Counsel should be provided at every stage of the proceedings, including sentencing, appeal, certiorari and postconviction review. In capital cases, counsel also should be provided in clemency proceedings. Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant's right to appeal, if necessary.⁵⁴⁰

Because the Court drew the line of the Sixth Amendment right to effective assistance of counsel at the end of the first level of appeal from conviction in *Ross v. Moffitt*,⁵⁴¹ there is no constitutional right for indigent defendants to obtain counsel's assistance in petitioning the Supreme Court for certiorari. Consequently, counsel's decision not to file a certiorari petition, which might otherwise reflect an objectively reasonable strategic decision, will not constitute ineffective assistance requiring relief from that decision, even if it is not the product of reasonable strategy.⁵⁴²

540. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-6.2 (AM. BAR. ASS'N 1992).

541. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

542. *See Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008) (holding defendant had no constitutional right to assistance of counsel in petitioning for writ of certiorari even though Circuit policy might have required counsel to proceed). In *Steele*, the defendant could not demonstrate probable prejudice from her counsel's decision not to petition for writ of certiorari, even though her co-defendant brother's certiorari petition had been granted, his sentence vacated and the case

Even experienced appellate lawyers may decide not to pursue certiorari as an option for clients who have lost on federal constitutional claims in state courts or lower federal courts. The financial expense associated with petitioning for certiorari are not insubstantial in light of the filing fee and cost of printing the petition and briefs, in the event the petition is granted, quite apart from the substantial fee that may reasonably be charged by retained counsel undertaking work requiring this level of professional excellence.⁵⁴³ In fact, the sheer expense involved might itself reasonably deter clients able to afford representation before the Court from absorbing the cost given the unlikely prospect that any single certiorari petition will be granted. Nevertheless, it would be foolish not to recognize the need to put forward the best possible arguments, supported by exhaustive research, when petitioning the Court to reach a decision that will have national implications for the practice of criminal law.⁵⁴⁴

Indigent petitioners, of course, will typically be excused from paying the filing fee and printing requirements. However, when considering the very high level of work required in crafting the question presented and body of the petition, inadequate compensation—or complete lack thereof—may discourage counsel from preparing and filing the petition.

Beyond concern for the cost of petitioning the Court for review, many lawyers and petitioners may well view the infrequency with which petitions are granted in the context of shifting realities of the Court's judicial makeup. Appointment of political conservatives whose histories reflect more conservative judicial philosophy, like Justices Gorsuch and Kavanaugh, almost necessarily suggest that the prospects for relief urged by petitioners attacking convictions and sentences imposed in criminal prosecutions will be so unfavorable as to depress interest in petitioning for certiorari. This view is not unrealistic.

However, even conservative justices are not necessarily blind to valid claims for justice and procedural fairness. This is one of the realities of judicial decision-making that continue to make practice particularly

remanded for reconsideration in light of *Booker v. United States*, because he had obtained no relief from the sentence previously imposed when the case was remanded. *Id.* at 989.

543. This is not to suggest that counsel should not routinely exert the highest degree of professionalism in their work in trial or lower appellate courts, of course.

544. See *Goeke v. Branch*, 514 U.S. 115, 120–21 (1995) (showing Branch's argument on the *Teague* exception to convince the court that would set new implications on criminal law and have a nationwide affect).

rewarding to lawyers who have been educated during a period of Supreme Court activism; and has guaranteed continuing interest in making sound arguments on behalf of clients who have been convicted of committing crimes. Even the more conservative lineup suggested by the recent appointments made by President Trump does not necessarily mean that the Court will lead to frustration of counsel offering novel, interesting, or well-crafted arguments that call for review of precedent or announcement of new rules of constitutional criminal procedure in the certiorari process.⁵⁴⁵

Decisions rendered during the 2019 Term support the view that while the Court may exhibit a more conservative posture on broad issues of public or social policy, its decisions will continue to focus on well-argued claims challenging existing doctrine or precedent. A split court issued *United States v. Davis*,⁵⁴⁶ with Justice Gorsuch joining four liberals in rejecting the use of the residual clause as a substitute for precise definition of the conduct constituting a criminal offense.⁵⁴⁷ The majority relied on the earlier decision in *Johnson v. United States*,⁵⁴⁸ in which Justice Scalia wrote

545. Nor do predictions about behavior of individual justices warrant the conclusion that so-called liberal and conservative blocks will necessarily align to dominate the direction of the Court's decision-making. For instance, in *Stuart v. Alabama*, the Court declined to grant certiorari in a case involving the basic holding of *Crawford v. Washington*, and subsequent decision in *Bullcoming v. New Mexico*. *Stuart v. Alabama*, 139 S. Ct. 36 (2018); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Crawford v. Washington*, 541 U.S. 36 (2004). In the latter case, the majority extended *Crawford*'s constitutional requirement for cross-examination of testimonial hearsay to include the laboratory technician's conclusions regarding the results of a test the technician had personally performed. *Bullcoming*, 564 U.S. at 665. The Alabama court held that admission of the test result through the testimony of another analyst who had not performed the test did not violate the defendant's Sixth Amendment right to confront the witnesses against her. *Stuart*, 139 S. Ct. at 36. Both the Alabama Court of Criminal Appeals's initial opinion and order denying review are unpublished. Petition for Writ of Certiorari at 1, *Stuart*, 139 S. Ct. at 36 (No. 17-1676). Justice Gorsuch, joined by Justice Sotomayor, dissented from the denial of certiorari, blaming the lack of consensus within the Court in its prior decision in *Williams v. Illinois*, for suggesting a departure from the bright-line rule adopted in *Crawford* and *Bullcoming*, despite the lack of any acceptance of Alabama's position on the part of the four Justices writing opinions in *Williams*. *Stuart*, 139 S. Ct. at 37–38; *Williams v. Illinois*, 567 U.S. 50 (2012). Justice Gorsuch was also joined by Justice Sotomayor, dissenting from denial of certiorari in *Hester v. United States*, another Sixth Amendment case in which the issue involved whether the amount of restitution ordered in a criminal prosecution should be subject to jury determination. *Hester v. United States*, 139 S. Ct. 509, 509 (2019).

546. *United States v. Davis*, 139 S. Ct. 2319 (2019) (holding 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague).

547. *Id.* at 2324.

548. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

for the majority in holding that the Residual Clause in the Armed Career Criminal Act of 1984⁵⁴⁹ was unconstitutionally vague.⁵⁵⁰ Justice Kavanaugh dissented in *Davis*, suggesting that fear of a monolithic conservative bloc on the Court may be premature.⁵⁵¹

Decisions rendered in this term reflect the Court's recent history, with unexpected coalitions advancing differing positions that might seem ideologically inconsistent. For instance, in *Byrd v. United States*,⁵⁵² the Court concluded that a driver in lawful possession of a rental car had a reasonable expectation of privacy in the vehicle in appropriate circumstances, even though his name was not listed on the rental agreement,⁵⁵³ abrogating prior circuit decisions to the contrary.⁵⁵⁴ While the majority's opinion left open additional questions for future litigation,⁵⁵⁵ it foreclosed the Government's position that the unlisted driver lawfully operating the rental car lacked a reasonable expectation of privacy affording him protection under the Fourth Amendment based on violation of the terms of the rental agreement, with the majority explaining:

[F]or Fourth Amendment purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between private parties—violators might pay additional fees, lose

549. 18 U.S.C. § 924(e)(2)(B) (2018).

550. *Johnson*, 135 S. Ct. at 2557.

551. See, e.g., Leah Litman, *Opinion Analysis: Vagueness Doctrine As a Shield for Criminal Defendants*, SCOTUSBLOG (June 24, 2019), <https://www.scotusblog.com/2019/06/opinion-analysis-vagueness-doctrine-as-a-shield-for-criminal-defendants/> [https://perma.cc/5EL7-MA8S] (“The opinion in *Davis* underscores an important jurisprudential difference in criminal cases between the two most recent nominees to the Supreme Court, Kavanaugh and Gorsuch. The tone of the majority opinion—and its concern about judges’ broadening already expansive criminal statutes—is very different from the tone of Kavanaugh’s dissent. The dissent opens with the claim that ‘crime and firearms form a dangerous mix,’ and it then proceeds to discuss various statistics about violent crime. Against this backdrop, the dissent finds ways to interpret Section 924(c) that would save the statute, perhaps to rescue us from that ‘dangerous mix’ of ‘crime and firearms.’”).

552. *Byrd v. United States*, 138 S. Ct. 1518 (2018).

553. *Id.* at 1528.

554. *Id.* at 1526 (“This Court granted Byrd’s petition for a writ of certiorari to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car.” (citing *Byrd v. United States*, 138 S. Ct. 54 (2017) (mem.))).

555. In fact, Justice Thomas, joined by Justice Gorsuch, explained hesitation in reading too much into the disposition in the majority opinion, a view shared by Justice Alito, who also concurred in the Court’s opinion. *Id.* at 1531–32 (Thomas, J., concurring).

insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she otherwise has lawful possession of and control over the car.⁵⁵⁶

But, in answering the question of the unlisted driver's privacy expectation in addressing his standing to challenge the search, the majority offered appellate lawyers the promise of further litigation, the heart of the appellate lawyer's practice. It explained:

Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government's arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event. The Court of Appeals has discretion as to the order in which these questions are best addressed.⁵⁵⁷

Counsel, skeptical about prospects for success in seeking development of new constitutional doctrine involving criminal procedural protections, or refinement of existing doctrine, or, vigorous enforcement of existing precedent, should be reminded that the evidence suggests that the Court may always be receptive to well-reasoned arguments brought in good faith "for an extension, modification or reversal of existing law."⁵⁵⁸ Consider Justice Gorsuch's key vote and opinion for the plurality in *United States v. Haymond*,⁵⁵⁹ holding that the defendant whose probation, ordered as a convicted sex offender, is being revoked for imposition of a mandatory minimum sentence is entitled to a jury trial on the question of his guilt on the offense on which revocation of his probation is based.⁵⁶⁰ Justice Gorsuch wrote:

556. *Id.* at 1529.

557. *Id.* at 1531.

558. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2019).

559. *United States v. Haymond*, 139 S. Ct. 2369 (2019).

560. *Id.* at 2382.

[I]n this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. *As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.*⁵⁶¹

Similarly, consider Justice Kavanaugh's strong opinion for the Court in *Flowers v. Mississippi*,⁵⁶² reversing the capital conviction and death sentence imposed in a sixth trial based on the prosecutor's violation of *Batson*.⁵⁶³ Writing for the majority, Justice Kavanaugh pointed to the fact that the same prosecutor served as lead counsel in all six trials and used the State's peremptory challenges "to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court."⁵⁶⁴ Although there is likely great concern over his conservative views, particularly in light of the contentious confirmation hearing,⁵⁶⁵ his opinion for the majority demonstrates a willingness to enforce existing precedent favorable to criminal defendants, including capital defendants sentenced to death.⁵⁶⁶ And, much like *Hinton*, the majority opinion very carefully explained:

561. *Id.* at 2373 (emphasis added).

562. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

563. *Id.* at 2234–35.

564. *Id.* at 2235.

565. See Sheryl Gay Stolberg, *Kavanaugh Is Sworn In after Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/MJ3A-PRD3>] (characterizing confirmation fight as "bitter").

566. Perhaps somewhat ironically in light of the positive comments with respect to Justice Gorsuch in these conclusions, Justice Gorsuch, in fact, dissented in *Flowers*, joining Justice Thomas's dissent, except with respect to Part IV, in which Justice Thomas affirmed his long-standing dispute with *Batson* and its underlying principles, arguing:

Much of the Court's opinion is a paean to *Batson v. Kentucky*, which requires that a duly convicted criminal *go free* because a juror was arguably deprived of his right to serve on the jury. That rule was suspect when it was announced, and I am even less confident of it today. *Batson* has led the Court to disregard Article III's limitations on standing by giving a windfall to a convicted criminal who, even under *Batson's* logic, suffered no injury. It has forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes. And it has blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.

Flowers, 139 S. Ct. at 2269 (Thomas, J., dissenting) (emphasis added). Of course, the Court's decision vacating the conviction and remanding the case did not "require[] that a duly convicted criminal go

All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, *we break no new legal ground*. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.⁵⁶⁷

Thus, as in *Hinton*, the Court's function in the certiorari process was not the development of new criminal procedure doctrine, but the correction of an obvious and persistent flaw in the lack of fidelity to existing precedent, particularly in the Alabama trial court. The Court's exercise of its jurisdiction drew the same criticism for its action in correcting error that led Justice Scalia to attack the grant of certiorari in *Kyles*,⁵⁶⁸ a dissent in which Justice Thomas joined.

For criminal defendants, the current composition of the Supreme Court could hardly be viewed as favorable, but not simply because it may be dominated by ideological conservatives or Republican judicial appointees. For lawyers involved in criminal trial, appellate, and post-conviction representation, the prospects might similarly be viewed as rather dim, but this view should be tempered by two realities. First, the major portion of the work necessary for developing the promise of federal criminal

free," at all, this expression by Justice Thomas of his continuing hostility toward *Batson* rests on a misrepresentation of the disposition. *Id.*

567. *Id.* at 2251. Justice Alito emphasized the same point, explaining his alignment with the majority:

But this is not an ordinary case, and the jury selection process cannot be analyzed as if it were. In light of all that had gone before, it was risky for the case to be tried once again by the same prosecutor in Montgomery County. Were it not for the unique combinations of circumstances present here, I would have no trouble affirming the decision of the Supreme Court of Mississippi, which conscientiously applied the legal standards applicable in less unusual cases. But viewing the totality of the circumstances present here, I agree with the Court that petitioner's capital conviction cannot stand.

Id. at 2252 (Alito, J., concurring) (emphasis added). Justice Alito had earlier written the majority opinion in *Snyder v. Louisiana*. *Snyder v. Louisiana*, 552 U.S. 472, 473 (2008). In *Snyder*, the reversal was based on one of the circumstances addressed also by the *Flowers* Court—pointedly disparate questioning of majority and minority jurors during the voir dire examination. *Id.* at 483–84. Justice Alito's vote in *Flowers* was consistent with his position in *Snyder*. Although a solid conservative vote on the Court, his willingness to enforce *Batson* is apparent.

568. *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting).

procedural protection has been accomplished over the past six decades, largely through the selective incorporation of protections afforded by the First, Fourth, Sixth, Eighth, and recently Second Amendments to state court proceedings through the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁵⁶⁹ Second, despite the Court's own skepticism about the possibility of recognition of "watershed" rules of criminal procedure expressed in *Teague*,⁵⁷⁰ the Court continues to grant certiorari to

569. With the exception of *Hurtado v. California*, in which the Court held that the Fifth Amendment right to trial on an indictment returned by a grand jury did not apply to state prosecutions, the procedural rights recognized for criminal defendants in the Fourth, Fifth, Sixth and Eighth Amendments have been held to apply in state proceedings through the guarantee of due process clause of the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516, 534–35 (1884).

The quickly accomplished "selective incorporation" process included major decisions: *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (applying protection against double jeopardy to state proceedings); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (applying Fifth Amendment privilege against self-incrimination in state proceedings); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (applying exclusionary rule to require suppression of physical evidence seized in violation of Fourth Amendment to state court prosecutions). The important rights secured by the Sixth Amendment were made applicable in state proceedings in a series of important cases, including the right to a jury trial in *Duncan v. Louisiana*; the right to a speedy trial in *Klopfer v. North Carolina*; the right to confrontation in *Pointer v. Texas*; the right to compulsory process to obtain testimony and develop a defense in *Washington v. Texas*; and the right to assistance of counsel in *Gideon v. Wainwright*. *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967); *Washington v. Texas*, 388 U.S. 14, 18 (1967); *Pointer v. Texas*, 380 U.S. 400, 403–04 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

More recently, the Court relied on the right to notice in the accusation as a basis for requiring charging of factual allegations used for sentencing enhancement in the charging instrument in state proceedings. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). In 1972, the Court applied the Eighth Amendment in voiding existing state death penalty statutes in *Furman v. Georgia*, finding that the lack of effective standards or criteria for capital sentencing resulted in an unconstitutional application of the death penalty. *Furman v. Georgia*, 408 U.S. 238, 242 (1972). Thus, by the mid-1970's, application of virtually every protection afforded by the Fourth, Fifth, Sixth and Eighth Amendments had been applied to state court proceedings through the Fourteenth Amendment Due Process Clause. Similarly, the Court has held that the Second Amendment generally includes the right of an individual "to keep and bear arms." *McDonald v. City of Chicago*, 561 U.S. 742, 759 (2010).

Significant judicial and scholarly comment has focused on the doctrine of "selective incorporation." See, e.g., Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 748 (1965). For discussion of the "selective incorporation" doctrine in the Supreme Court's opinions, including the differing views, note the separate opinions of Justices Frankfurter and Black in *Adamson v. California*. *Adamson v. California*, 332 U.S. 46, 59, 63–65, 68, 71–90 (1947), *overruled in part by* *Malloy v. Hogan*, 378 U.S. 1 (1964). The *Adamson* majority concluded that the Fifth Amendment protection against self-incrimination did not apply to a California capital prosecution. *Id.* at 54–55. *Adamson* was overruled in *Malloy v. Hogan*. *Malloy*, 378 U.S. at 11.

570. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

consider *new* rules,⁵⁷¹ application of existing precedent in novel situations,⁵⁷² refinement of existing precedent,⁵⁷³ and rigorous enforcement of precedent.⁵⁷⁴ The continuing development of precedent suggests that while there is pessimism with respect to philosophical leanings of the Justices, which may often prove less than consistent or even contrary to expectation, it should not foreclose recourse through certiorari with respect to federal constitutional protections afforded criminal defendants because, certiorari is not simply the last, best option for relief, it is the only option.

Counsel practicing in criminal courts, particularly in appellate and post-conviction practice, should always bear in mind that courts are likely to be only as good as the lawyers who practice before them. And practicing criminal attorneys should be reminded of Justice Hays's admonition in the Vermont Supreme Court in *State v. Jewett*⁵⁷⁵: "The imaginative lawyer is still the fountainhead of our finest jurisprudence."⁵⁷⁶

571. *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); see *supra* notes 475–506 and accompanying text.

572. *Hinton v. Alabama*, 571 U.S. 263, 272 (2014); see *supra* notes 511–39 and accompanying text.

573. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); see *supra* notes 431–56 and accompanying text.

574. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); see *supra* notes 562–67 and accompanying text.

575. *State v. Jewett*, 500 A.2d 233 (Vt. 1985).

576. *Id.* at 237.